> (d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the director or seizing law enforcement agency *subject only to the orders and decrees of the circuit court* having jurisdiction over the property seized.

(Emphasis added.)

This statute vests authority for disposition of seized property in the circuit court. We find the holdings and rationale of the Seventh and Fifth Circuits persuasive. Although not binding on this Court, those decisions offer compelling reasoning for our holding that absent an order of the appropriate circuit court, transfer of seized property by the seizing law enforcement agency is invalid. While we disagree with and reverse the trial court's finding that the Crittenden County Prosecutor's Office was the seizing law enforcement agency, we affirm the court's attempted exercise of jurisdiction over the seized property pursuant to § 5-64-505. Appellant raises many issues on appeal but these issues are essentially resolved by our interpretation of § 5-64-505 to be a "turnover" statute. Accordingly, we affirm the trial court in part and reverse it in part.

Affirmed as modified.

II. OTHER RELEVANT OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW ENTERED IN THE CASE

CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Order
(Filed March 18, 1998) R. 25.

On this 17th day of March, 1998, comes before the Court, the Plaintiff, by and through its attorney, James C. Hale, III, and from the statements of counsel, and the facts before the Court, the Court doth find:

That on March 7, 1998, Three Million One Hundred Sixty Six One Hundred Ninety Nine *[sic]* ($3,166,199.00) in U. S. Currency was seized for violation of Arkansas Code Annotated § 5-64-505 by the Arkansas Highway Police in Crittenden County, Arkansas. R. 25.

That the above-mentioned U.S. Currency was removed by the Arkansas Highway Police from Crittenden County, Arkansas and forwarded to the Arkansas Highway Police Headquarters located in Little Rock, Arkansas. R. 25.

That the Arkansas Highway Police is hereby Ordered to deposit said currency in a Federally Insured Depository and said U.S. Currency is to be wired into P.A. Drug Asset Holding Account located at the Citizens Bank in Marion, Crittenden County, Arkansas bearing account number 189100 and forwarded within ten (10) days of the issuance of this Order. R. 25.

IT IS SO ORDERED this 17th day of March, 1998.

/S/ David Burnett, Circuit Judge

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Order of Forfeiture
(Filed April 20, 1998) (R. 125)

Now on this 20th day of April, 1998, comes the Plaintiff, the State of Arkansas before the Court, by and through its attorney, James C. Hale, III, and in seeking an Order of Forfeiture, this Court finds:

1. That the State of Arkansas seeks forfeiture of $3,166,199 dollars in U. S. Currency pursuant to Arkansas Code

Annotated Section 5-64-505, and this action was commenced pursuant to Arkansas Code Annotated Section 5-64-505.

2. That the above-referenced U. S. Currency were seized by the Crittenden County Prosecuting Attorney's Office from Roberto V. Zamarripa for violation of A.C.A. 5-64-505 on March 7, 1998, in Crittenden County, Arkansas.

3. That this Court has In Rem Jurisdiction pursuant to Arkansas Code Annotated § 5-64-505 et seq.

4. That claimant Roberto V. Zamarripa had waived any interest he may have in the $3,166,199 dollars in U. S. Currency and agrees to forfeit said monies to the Crittenden County Prosecuting Attorney's Office.

5. That jurisdiction is proper in the Circuit Court of Crittenden County, Arkansas pursuant to Arkansas Code Annotated § 5-64-505 et seq.

6. That any interest that Roberto V. Zamarripa has in the $3,166,199 dollars in U. S. Currency is forfeited to the Crittenden County Prosecuting Attorney's Office.

WHEREFORE IT IS BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that any interest of Roberto V. Zamarripa in the $3,166,199 dollars in U. S. Currency is hereby forfeited to the Crittenden County Prosecuting Attorney's Office. R. 125.

IT IS ORDERED this 20th day of April 1998.

/S/ David Burnett, Circuit Judge

APPROVED AS TO FORM:
/S/ James C. Hale, III, Attorney for Plaintiff
/S/ Bart Ziegenhorn, Attorney for Claimant, Public Defender
/S/ Roberto V. Zamarripa, Claimant

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Order of Forfeiture
(Filed April 24, 1998) (R. 127)

Now on this 24th day of April, 1998, comes the Plaintiff, the State of Arkansas before the Court, by and through its attorney, James C. Hale, III, and Omar Saenz and H & W Trucking, Inc., by and through their attorneys, Chad Durrett and John L. Alden, in seeking and Order of Forfeiture, this Court finds:

1. That the State of Arkansas seeks forfeiture of $3,166,199 dollars in U. S. Currency pursuant to Arkansas Code Annotated Section 5-64-505, and this action was commenced pursuant to Arkansas Code Annotated Section 5-64-505.

2. That this Court has In Rem Jurisdiction pursuant to Arkansas Code Annotated § 5-64-505 et seq.

3. That the above-referenced U. S. Currency were seized by the Crittenden County Prosecuting Attorney's Office from Roberto V. Zamarripa for violation of A.C.A. 5-64-505 on March 7, 1998, in Crittenden County, Arkansas.

4. That Omar Saenz is not claiming any interest in the $3,166,199 dollars in U. S. Currency and waives all rights to said moneys.

5. That H & W Trucking, Inc. is not claiming any interest in the $3,166,199 dollars in U. S. Currency and waives all rights to said moneys.

6. That any interest Omar Saenz has in the $3,166,199 dollars in U. S. Currency is forfeited to the Crittenden County Prosecuting Attorney's Office.

7. That any interest H & W Trucking, Inc. has in the $3,166,199 dollars in U. S. Currency is forfeited to the Crittenden County Prosecuting Attorney's Office. R. 128.

8. That Claimants waive any right to or cause of action against Plaintiff or any of Plaintiff's agencies, employees, or representatives that he or his assignees have or may have in any Court stemming from the March 7, 1998 seizure.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that Omar Saenz and H & W Trucking, Inc. may have in the seized $3,166,199 dollars in U.S. Currency is forfeited to the Crittenden County Prosecuting Attorney's Office.

IT IS SO ORDERED this 24th day of April, 1998.

/S/ David Burnett, Circuit Judge

APPROVED AS TO FORM:
/S/ James C. Hale, III, Attorney for Plaintiff
/S/ Chad Durrett, Attorney for Claimant, Omar Saenz
/S/ John L. Alden, Attorney for Dino Ghiloni,
H&W Trucking, Inc., and Omar Saenz

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Order of Forfeiture
(Filed April 24, 1998) (R. 129)

Now on this 24th day of April, 1998, comes the Plaintiff, the State of Arkansas before the Court, by and through its attorney, James C. Hale, III, in seeking an Order of Forfeiture, this Court finds:

1. That the State of Arkansas seeks forfeiture of $3,166,199 dollars in U. S. Currency pursuant to Arkansas Code Annotated Section 5-64-505, and this action was commenced pursuant to Arkansas Code Annotated Section 5-64-505.

2. That this court has In Rem Jurisdiction pursuant to Arkansas Code Annotated § 5-64-505 et seq.

3. That the above-referenced U. S. Currency were seized by the Crittenden County Prosecuting Attorney's Office from Roberto V. Zamarripa for violation of A.C.A. 5-64-505 on March 7, 1998, in Crittenden County, Arkansas.

4. That on March 20, 1998, a complaint was filed in the present case seeking forfeiture of the $3,166,199.

5. That on March 20, 1998, the complaint in this cause of action was served upon Roberto V. Zamarripa, the individual being in possession of the $3,166,199 dollars in U. S. Currency.

6. That on April 20, 1998, Roberto V. Zamarripa entered into an Order forfeiting any interest he may have in the $3,166,199 in U. S. Currency to the Crittenden County Prosecuting Attorney's Office.

7. That Omar Saenz, the owner of the vehicle transporting the U. S. Currency entered into an Order forfeiting any interest that he may have in the $3,166,199 dollars in U. S. Currency to the Crittenden County Prosecuting Attorney's Office. R. 130.

8. That H&W Trucking, Inc., the owner of the vehicle transporting the $3,166,199 dollars in U. S. Currency has entered an order forfeiting any interest that it may have in the said currency to the Crittenden County Prosecuting Attorney's Office.

9. That on March 20, 1998, a Warning Order was issued by the Circuit Clerk of Crittenden County, Arkansas, warning any person claiming any right, title, or interest in the $3,166,199 dollars in U. S. Currency to appear within thirty (30) days from the first date of publication or be barred from asserting an interest in the U. S. Currency.

10. That the Warning Order was first published on March 23, 1998, and again on March 30, 1998, in the Evening Times Newspaper, a newspaper of general circulation in the area of the seizure, and thirty (30) days have elapsed since the first date of publication.

11. That the Plaintiff has forfeited all known parties that may have had interest in the $3,166,199 dollars in U. S. Currency and has made due and diligent efforts to locate any other claimants.

WHEREFORE THE COURT DOTH FIND that the $3,166,199 dollars in U. S. Currency is forfeited to the Crittenden County Prosecuting Attorney's Office pursuant to Arkansas Code Annotated § 5-64-505. That the $3,166,199 dollars in U. S. Currency is to be deposited into the Crittenden County Prosecuting Attorney's Drug Asset Forfeiture Fund Holding Account pending further orders of the Court.

IT IS SO ORDERED this 24th day of April, 1998.

/S/ David Burnett, Circuit Judge

CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Order
(Entered May 8, 1998) R. 147

On April 1, 1998, this matter came before the Court. Same is presented by Arkansas Highway Police, through their attorney, Bill Wharton, and the Crittenden County Prosecuting Attorney's Office, through their attorney, James C. Hale, III, the Court being well advised in the premises and after argument of counsel and review of the authorities, makes the following findings of fact and law:

1. Plaintiff's Motion to Dismiss the Arkansas Highway Police as parties because they are not properly before the Court is denied. The Arkansas Highway Police filed numerous pleading, introduced evidence and testimony from witnesses at the hearing in this matter. The Arkansas Highway Police are made parties to this case and are subject to the jurisdiction of this Court.

2. The Court finds that there was not substantial evidence presented to the Court that there was a pending Federal forfeiture prior to this Court obtaining jurisdiction and the Court finds that it has jurisdiction of this forfeiture proceeding.

3. The Court makes a factual finding that although the Arkansas Highway Police did initially take possession of the money, based upon the facts presented, the Prosecuting Attorney's Office is the seizing agency for purposes of this forfeiture proceeding. R. 147.

4. The Court finds that the Arkansas Highway Police has not provided this Court with authority giving them the discretionary power to direct State forfeiture cases to the federal authorities. The Arkansas Highway Police had no authority to direct the forfeiture proceedings of the $3,166,199 to the federal government. The Court further finds that the Arkansas Highway Police has no authority to object to the present State forfeiture action and the objection was filed merely to circumvent State statutes regarding the disbursement of forfeited funds. R. 148.

5. The Court makes a finding of fact that the Crittenden County Prosecuting Attorney's Office did not waive its rights to pursue this forfeiture this being totally inconsistent with the facts presented.

6. The Court finds that since the Arkansas Highway Police does not have possession of the $3,166,199 that it cannot comply with the Court's March 18, 1998 Order.

IT IS SO ORDERED.

/S/ David Burnett, Circuit Judge

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Judgment
(Entered July 16, 1998) (R. 231-A)

On the 1st day of April, 1998, this matter came before the Court, the plaintiff appearing through its attorney, James C. Hale, III, and the Arkansas Highway Police by and through its attorneys, William L. Wharton and Lawrence W. Jackson, entered a special appearance for the purpose of contesting the jurisdiction of this court. The court, upon considering the pleadings, exhibits introduced, testimony adduced and argument of counsel, makes the following findings of fact and conclusions of law:

1. On March 7, 1998, an Arkansas Highway Police officer made a traffic stop on Roberto V. Zamarripa in Crittenden County, Arkansas. A search was conducted and $3,166,199 was discovered. R. 231-A

2. On March 7, 1998, the officer in charge of the Arkansas Highway Police in Marion contacted the Deputy Prosecuting Attorney in Crittenden County, Arkansas, as the duly sworn representative for the Prosecuting Attorney for the Second Judicial District, and requested the Deputy Prosecuting Attorney's assistance in seizing the U.S. currency.

3. Upon arrival, the Deputy Prosecuting Attorney seized the U.S. currency and arranged for it to be transferred, counted, and stored at Citizens Bank in Marion, Crittenden County, Arkansas.

4. On March 9, 1998, the U.S. currency was in the custody of the Deputy Prosecuting Attorney and forfeiture proceedings were instituted by the filing of Notice of Seizure for Forfeiture in this proceeding. 231-B.

5. On March 20, 1998, and March 27, 1998, the Arkansas Highway Police, through its employed attorneys, filed a motion to vacate and a motion to dismiss, respectively, and entered a special appearance in this proceeding.

6. On April 1, 1998, upon due notice mailed by the Court on March 24, 1998, to Paula J. Casey, United States Attorney for the Eastern District of Arkansas, Gwendolyn Hodge, Assistant United States Attorney, Bill Bryant, Director for the Drug Enforcement Administration, and Chip Massanelli, Deputy United States Marshal for the Eastern District of Arkansas, a hearing was conducted wherein the Arkansas Highway Police entered a special appearance to contest the jurisdiction of the court.

7. There was no testimony by any federal Drug Enforcement Administration ("DEA") agent or any representative from any federal agency that federal forfeiture proceedings were in progress.

8. There was no documentary evidence produced by the Arkansas Highway Police or any federal agency that there was any pending federal forfeiture action, or that 21 U.S.C. § 881 notice had been given.

9. The Prosecuting Attorney for the Second Judicial District did not waive state forfeiture proceedings.

10. The Arkansas Highway Police, without a court order, gave possession of the $3,166,199 to the United States Marshal.

11. The Arkansas Highway Police, at the time of the March 18, 1998, Order was not in possession of the $3,166,199. R. 231-B.

Conclusions Of Law (R. 231-C)

12. The Court obtained primary and exclusive jurisdiction over the res ($3,166,199) on March 9, 1998, because it first established in rem jurisdiction of the res on March 9, 1998, by instituting state forfeiture proceedings on March 9, 1998. R. 231-C.

13. The allegations that the DEA adopted the forfeiture action prior to March 9, 1998, is not supported by the evidence presented by the Arkansas Highway Police.

14. In addition, the DEA's administrative forfeiture proceeding begins with the publication of a 21 U.S.C. § 881 notice. The Arkansas Highway Police did not present proof of the 21 U.S.C. § 881 notice.

15. The transfer of the res to federal control and attempts by the DEA and the Arkansas Highway Police to adopt the forfeiture action was an affront to this Court's state court jurisdiction.

16. The Arkansas Highway Police's referral of the forfeiture action to the DEA was without the authority of the Prosecuting Attorney for the Second Judicial District as required by Ark. Code Ann. § 5-64-505(b).

17. The Arkansas Highway Police's referral of the forfeiture action to the DEA was an attempt to circumvent the intent and purpose of Ark. Code Ann. § 5-64-505 in order to avoid the $250,000 limit set forth in Ark. Code Ann. § 5-64-505(k)(2)(iii).

18. The court agrees with the Arkansas Highway Police and holds that the Arkansas Highway Police is not a party to this cause of action. The court modifies its May 8, 1998, order in this respect. However, prior to the April 1 hearing, the Arkansas Highway Police filed numerous pleadings in this lawsuit. The Arkansas Highway Police introduced exhibits and testimony through its two attorney at the hearing, made legal argument, and had full opportunity to contest the jurisdiction of the court. The Arkansas Highway Police, a law enforcement of the State of Arkansas, is bound by this Court's ruling regarding the in rem jurisdiction and forfeiture orders herein. R. 231-C to 231-D.

19. The Arkansas Highway Police, by turning possession of the $3,166,199 to the United States Marshal without an order or decree of this court, violated Ark. Code Ann. § 5-64-505. R. 231-D.

20. Subsequent to the March 9, 1998, institution of state forfeiture proceedings, the Arkansas Highway Police has no authority to divert asset forfeiture cases to federal authorities without an order pursuant to Ark. Code Ann. § 5-64-505(d). As a matter of law, the Arkansas Highway Police has no authority to object to this state forfeiture proceeding.

21. The court finds that the Arkansas Highway Police does not have possession of the $3,166,199 and it has no power to comply with this court's orders regarding surrender of the forfeited funds.

22. The court finds its April 20, 1998, April 24, 1998, and May 8, 1998 Orders and this Judgment are final for which execution may issue.

IT IS SO ORDERED.

/S/ David Burnett, Circuit Judge

III. ORDER ON REHEARING

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

April 29, 1999

Robert L. Wilson
Chief Counsel
Arkansas Highway & Transportation Department
P.O. Box 2261
Little Rock, AR 72203-2261

RE: 98 00957 In the Matter of $3,166,199, Arkansas Highway Police v. Crittenden County Prosecuting Attorney's Office et al.

Dear Mr. Wilson:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for Rehearing is denied."

Sincerely,
/S/ Leslie W. Steen, Clerk

cc: Mark Pryor
James C. Hale, III
Bart E. Ziegenhorn
Donna Palmer, Clerk

IV. JUDGMENT SOUGHT TO BE REVIEWED

See Part I, *supra*.

V. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Supremacy Clause of the United States Constitution, Art. 6, cl. 2.

> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

21 U.S.C. 873. Cooperative arrangements.

(a) Cooperation of Attorney General with local, State, and Federal agencies. The Attorney General shall cooperate with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he is authorized to—

> (1) arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances;
>
> (2) cooperate in the institution and prosecution of cases in the courts of the United States and

before the licensing boards and courts of the several States;

(3) conduct training programs on controlled substance law enforcement for local, State, and Federal personnel;

(4) maintain in the Department of Justice a unit which will accept, catalog, file, and otherwise utilize all information and statistics, including records of controlled substance abusers and other controlled substance law offenders, which may be received from Federal, State, and local agencies, and make such information available for Federal, State, and local law enforcement purposes;

(5) conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted;

(6) assist State and local governments in suppressing the diversion of controlled substances from legitimate medical, scientific, and commercial channels by—

(A) making periodic assessments of the capabilities of State and local governments to adequately control the diversion of controlled substances;

(B) providing advice and counsel to State and local governments on the methods by which such governments may strengthen their controls against diversion; and

(C) establishing cooperative investigative efforts to control diversion; and

(7) notwithstanding any other provision of law, enter into contractual agreements with State and local law enforcement agencies to provide for cooperative enforcement and regulatory activities under this Act.

(b) Requests by Attorney General for assistance from Federal agencies or instrumentalities. When requested by the Attorney General, it shall be the duty of any agency or instrumentality of the Federal Government to furnish assistance, including technical advice, to him for carrying out his functions under this title; except that no such agency or instrumentality shall be required to furnish the name of, or other identifying information about, a patient or research subject whose identity it has undertaken to keep confidential.

(c) Descriptive and analytic reports by Attorney General to State agencies of distribution patterns of schedule II substances having highest rates of abuse. The Attorney General shall annually (1) select the controlled substance (or controlled substances) contained in schedule II which, in the Attorney General's discretion, is determined to have the highest rate of abuse, and (2) prepare and make available to regulatory, licensing, and law enforcement agencies of States descriptive and analytic reports on the actual distribution patterns in such States of each such controlled substance.

(d) Grants. (1) The Attorney General may make grants, in accordance with paragraph (2), to State and local governments to assist in meeting the costs of—

(A) collecting and analyzing data on the diversion of controlled substances,

(B) conducting investigations and prosecutions of such diversions,

(C) improving regulatory controls and other authorities to control such diversions,

(D) programs to prevent such diversions,

(E) preventing and detecting forged prescriptions, and

(F) training law enforcement and regulatory personnel to improve the control of such diversions.

(2) No grant may be made under paragraph (1) unless an application therefor is submitted to the Attorney General in such form and manner as the Attorney General may prescribe. No grant may exceed 80 per centum of the costs for which the grant is made, and no grant may be made unless the recipient of the grant provides assurances satisfactory to the Attorney General that it will obligate funds to meet the remaining 20 per centum of such costs. The Attorney General shall review the activities carried out with grants under paragraph (1) and shall report annually to Congress on such activities.

(3) To carry out this subsection there is authorized to be appropriated $6,000,000 for fiscal year 1985 and $6,000,000 for fiscal year 1986.

21 U.S.C. § 878. Powers of enforcement personnel

(a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may—

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this title; and

(5) perform such other law enforcement duties as the Attorney General may designate.

(b) State and local law enforcement officers performing functions under this section shall not be deemed Federal employees and shall not be subject to provisions of law relating to Federal employees, except that such officers shall be subject to section 3374(c) of title 5, United States Code.

21 U.S.C. § 881. Forfeitures

(a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or listed chemical in violation of this title.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted

by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used,

or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this title.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, dispensed, acquired, or intended to be distributed, dispensed, acquired, imported, or exported, in violation of this title or title III.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act [21 U.S.C. §857]).

(11) Any firearm (as defined in section 921 of title 18, United States Code) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims. Any property subject to civil forfeiture to the United States under this title may be seized by

the Attorney General upon process issued pursuant to the *Supplemental Rules for Certain Admiralty and Maritime Claims* by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

> (1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
>
> (2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title;
>
> (3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
>
> (4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this title.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General. Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having

jurisdiction thereof. Whenever property is seized under any of the provisions of this title, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable. The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property. (1) Whenever property is civilly or criminally forfeited under this title the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 616 of the Tariff Act of 1930, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 490(b) of the Foreign Assistance Act of 1961 [22 U.S.C. §2291j(b)].

(2) (A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this title shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent. Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28, United States Code, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A), except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section

2003(b)(7) of title 39, United States Code, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(4) (A) With respect to real property described in subparagraph (B), if the chief executive officer of the State involved submits to the Attorney General a request for purposes of such subparagraph, the authority established in such subparagraph is in lieu of the authority established in paragraph (1)(B).

(B) In the case of property described in paragraph (1)(B) that is civilly or criminally forfeited under this title, if the property is real property that is appropriate for use as a public area reserved for recreational or historic purposes or for the preservation of natural conditions, the Attorney General, upon the request of the chief executive officer of the State

in which the property is located, may transfer title to the property to the State, either without charge or for a nominal charge, through a legal instrument providing that—

(i) such use will be the principal use of the property; and

(ii) title to the property reverts to the United States in the event that the property is used otherwise.

(f) Forfeiture of schedule I or II substances. (1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this title; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this title; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) which cannot be separated safely from such raw materials or products under such circumstances as the Attorney General may deem necessary.

(g) Plants. (1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this title, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) Property title, etc. vested in United States. All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil proceeding. The filing of an indictment or information alleging a violation of this title or title III, or a violation of State or local law that could have been charged under this title or title III, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue. In addition to the venue provided for in section 1395 of title 28, United States Code, or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(k) [Not enacted]

(l) Functions. The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

21 U.S.C. § 885. Burden of proof; liabilities

(a) Exemptions and exceptions; presumption in simple possession offenses. (1) It shall not be necessary for the United States to negative any exemption or exception set forth in this title in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this title, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

> (2) In the case of a person charged under section 404(a) [21 U.S.C. §844(a)] with the possession of a controlled substance, any label identifying such substance for purposes of section 503(b)(2) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. §353(b)(2)] shall be admissible in evidence and shall be prima facie evidence that such substance was obtained pursuant to a valid prescription from a

practitioner while acting in the course of his professional practice.

(b) Registration and order forms. In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this title, he shall be presumed not to be the holder of such registration or form, and the burden of going forward with the evidence with respect to such registration or form shall be upon him.

(c) Use of vehicles, vessels, and aircraft. The burden of going forward with the evidence to establish that a vehicle, vessel, or aircraft used in connection with controlled substances in schedule I was used in accordance with the provisions of this title shall be on the persons engaged in such use.

(d) Immunity of Federal, State, local and other officials. Except as provided in sections 2234 and 2235 of title 18, United States Code [18 U.S.C. §§2234, 2235], no civil or criminal liability shall be imposed by virtue of this title upon any duly authorized Federal officer lawfully engaged in the enforcement of this title, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

28 U.S.C. § 1355.

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

(b)(1) A forfeiture action or proceeding may be brought in —

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District court or the District of Columbia.

(c) In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing to post an appeal bond.

(d) Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.

28 U.S.C. § 1356.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

Ark. Code Ann. § 5-64-501.

Any law enforcement officer, or any person authorized to enforce subchapters 1-6 of this chapter, or any employee of the State Health Department designated by the director to conduct examinations, investigations, or inspections under subchapters 1-6 of this chapter relating to controlled substances or to counterfeit drugs may:

(1) Carry firearms in the performance of his official duties;

(2) Execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of this state;

(3) Make arrests without warrant for any offense under subchapters 1-6 of this chapter committed in his presence, or if he has probable cause to believe that the person to be arrested has committed a violation of subchapters 1-6 of this chapter which may constitute a felony;

(4) Make seizures of property pursuant to subchapters 1-6 of this chapter; or

(5) Perform other law enforcement duties as the director designates.

Ark. Code Ann. § 5-64-504.

(a) The director shall cooperate with federal and other state agencies in discharging its responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he may:

(1) Arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) Coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;

(3) Cooperate with the Bureau by establishing a centralized unit to accept, catalogue, file, and collect statistics, including records of drug dependent persons and other controlled substance law offenders within the state, and make the information available for federal, state, and local law enforcement purposes. He shall not furnish the name or identity of a patient or research subject whose identity could not be obtained under subsection (c) of this section; and

(4) Conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

(b) Results, information, and evidence received from the Bureau relating to the regulatory functions of subchapters 1-6 of this chapter, including results of inspections conducted

by it, may be relied and acted upon by the director in the exercise of its regulatory functions under subchapters 1-6 of this chapter.

(c) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the director nor may he be compelled in any state or local civil, criminal, administrative, legislative, or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

Ark. Code Ann. § 5-64-505.

(a) The following are subject to forfeiture:

(1) All controlled substances and counterfeit substances which have been manufactured, distributed, dispensed, or acquired in violation of subchapters 1-6 of this chapter;

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or counterfeit substance in violation of subchapters 1-6 of this chapter;

(3) All property which is used, or intended for use, as a container for property described in subdivision (a)(1) or (2);

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or

receipt of property described in subdivision (a)(1) or (2), but:

(i) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of subchapters 1-6 of this chapter;

(ii) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent and without the knowledge or consent of anyone having possession, care, or control of the conveyance with the owner's permission;

(iii) A conveyance is not subject to forfeiture for a violation of § 5-64-401 (c); and

(iv) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.

(5) All books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of subchapters 1-6 of this chapter.

(6) Everything of value furnished or intended to be furnished, in exchange for a controlled substance or counterfeit substance in violation of subchapters 1-6 of this chapter, all proceeds and profits traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of subchapters 1-6 of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him to have been committed or omitted without his knowledge or consent.

REBUTTABLE PRESUMPTIONS. All moneys, coin, and currency found in close proximity to forfeitable controlled substances, to counterfeit substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture, or distribution of controlled substances or counterfeit substances are presumed to be forfeitable under this paragraph. The burden of proof is upon claimants of the property to rebut these presumptions.

(7) Real property may be forfeited under subchapters 1-6 of this chapter if it substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any act prohibited by subchapters 1-6 of this chapter, except that:

(i) No real property is subject to forfeiture under subchapters 1-6 of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;

(ii) Real property is not subject to forfeiture for a violation of § 5-64-401(c); and

(iii) A forfeiture of real property encumbered by a mortgage or other lien is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the unlawful act or omission.

(iv) Upon conviction, when the circuit court having jurisdiction over the real property seized finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this section, the court shall enter an order consistent with subsection (k) of this section.

(v) When any court orders a forfeiture of real property pursuant to subchapters 1-6 of this chapter, the order shall be filed of record on the day issued and shall have prospective effect only.

(vi) A forfeiture of real property ordered under the provisions of subchapters 1-6 of this chapter shall not affect the title of a bona fide purchaser who purchased the property prior to the issuance of the order, and such order shall have no force or effect on the title of the bona fide purchaser.

(vii) Any lis pendens filed in connection with any action pending under the provisions of subchapters 1-6 of this chapter which

might result in the forfeiture of real property shall be operative only from the time filed and shall have no retroactive effect.

(b) Property subject to forfeiture under subchapters 1-6 of this chapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the property on petition filed by the prosecuting attorney of the judicial circuit. Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon subchapters 1-6 of this chapter;

(3) The director has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The director or any law enforcement agent has probable cause to believe that the property was used or is intended to be used in violation of subchapters 1-6 of this chapter.

(c) In the event of seizure pursuant to subsection (b) of this section, proceedings under subsections (d) and (e) of this section shall be instituted promptly.

(d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the director or seizing law enforcement agency subject only to

the orders and decrees of the circuit court having jurisdiction over the property seized. When property is seized under subchapters 1-6 of this chapter, the director or seizing law enforcement agency may:

(1) Place the property under seal;

(2) Remove the property to a place designated by it; or

(3) Require the director to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(e) When the circuit court having jurisdiction over the property seized finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under subchapters 1-6 of this chapter, the court shall enter an order consistent with subsection (k) of this section.

(f) Controlled substances listed in Schedule I that are possessed transferred, sold, or offered for sale in violation of subchapters 1-6 of this chapter are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in Schedule I, which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

(g) Species of plants from which controlled substances in Schedules I, II, and VI may be derived which have been planted or cultivated in violation of subchapters 1-6 of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the state.

(h) The failure, upon demand by the director, or his authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, constitutes authority for the seizure and forfeiture of the plants.

(i) All drug paraphernalia and counterfeit substances except in the possession or control of a practitioner in the course of professional practice and/or research shall be subject to civil seizure and forfeiture.

(j)(1) If property is seized for forfeiture under subchapters 1-6 of this chapter, the seizing agency which seized the property may, subject to any need to retain the property as evidence:

(i) Remove the property to a place designated by the circuit court;

(ii) Place the property under constructive seizure posting notice of pending forfeiture on it, by giving notice of pending forfeiture to its owners and interest holders, or by filing notice of pending forfeiture in any appropriate public record relating to the property;

(iii) Remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, or is not needed for evidentiary purposes, deposit it in an interest-bearing account;

(iv) Provide for another agency or custodian, including an owner, secured party, mortgagee, or lienholder, to take custody of

the property and service, maintain, and operate it as reasonably necessary to maintain its value in any appropriate location within the jurisdiction of the court; or

(v) Require the law enforcement agency to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(2) A person who acts as custodian of property under this section is not liable to any person on account of acts done in compliance with an order under subchapters 1-6 of this chapter in a reasonable manner.

(3) As soon as practicable after seizure for forfeiture, the seizing agency shall conduct an inventory and estimate the value of the property seized. The seizing agency shall maintain a log book which lists the following:

(i) A description of the property;

(ii) The estimated value;

(iii) The location of the property; and

(iv) The disposition of the property.

(k)(1) Whenever property is forfeited under subchapters 1-6 of this chapter, the circuit court shall enter an order:

(i) To permit the law enforcement agency or attorney for the state to retain the property

for official use except that all aircraft shall be transferred to the Arkansas Drug Director;

(ii) To sell that which is not required by law to be destroyed and which is not harmful to the public. Such property shall be sold at a public sale to the highest bidder, and if not sold at public sale, the court may permit a private sale. The proceeds of any sale and any moneys forfeited or obtained by judgment or settlement under subchapters 1-6 of this chapter shall be deposited in the special asset forfeiture fund of the attorney for the state.

(2) The attorney for the state shall administer expenditures from the fund. The fund is subject to audit by the Division of Legislative Audit. Moneys in the fund must be distributed in the following order:

(i) For satisfaction of any bona fide security interest or lien;

(ii) For payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs; and

(iii) Any balance under two hundred fifty thousand dollars ($250,000) shall be distributed proportionally so as to reflect generally the contribution of the appropriate local or state law enforcement or prosecutorial agency's participation in any of the activities that led to the seizure or

forfeiture of the property or deposit of moneys under subchapters 1-6 of this chapter;

(iv) Any balance over two hundred fifty thousand dollars ($250,000) shall be forwarded to the Department of the Arkansas State Police to be transferred to the State Treasury for deposit in the Special State Assets Forfeiture Fund for distribution as provided in subsection (l).

(3) All controlled substances shall be forwarded to the Drug Enforcement Administration or Department of Health for disposition or destruction.

(4)(i) There is created on the books of law enforcement agencies and attorneys for the state a Drug Control Fund. The Drug Control Fund shall consist of all moneys obtained under subsection (l) and other revenues as may be provided by law or ordinance. Moneys from the fund may not supplant other local, state, or federal funds. Moneys in this fund are appropriated on a continuing basis and are not subject to the Revenue Stabilization Law, § 19-5-101 et seq. Moneys in this fund must only be used for law enforcement and prosecutorial purposes. The fund is subject to audit by the Division of Legislative Audit.

(ii) The law enforcement agencies and attorneys for the state shall submit to the State Drug Director on or before January 1

and July 1 of each year a report detailing all moneys received and expenditures made from the Drug Control Fund during the preceding six-month period.

(l)(1) There is created and established on the books of the State Treasurer, the State Auditor, and the Chief Fiscal Officer of the State a fund to be known as the Special State Assets Forfeiture Fund

(2) The Special State Assets Forfeiture Fund shall consist of revenues obtained under subdivision (k)(2)(iv) and any other revenues as may be provided by law. All moneys obtained under subdivision (k)(2)(iv) shall be deposited in this fund. Moneys from the fund may not supplant other local, state, or federal funds.

(3) This fund shall not be subject to the provisions of the Revenue Stabilization Law, § 19-5-101 et seq., or subject to the provisions of § 19-5-203 (b)(2)(A), the Special Revenue Fund Account.

(4) The State Drug Director shall establish through rules and regulations a procedure for proper investment and disposition of moneys deposited in the special asset forfeiture fund in accordance with the intent and purposes of subchapters 1-6 of this chapter.

(m) Forfeitures under this section may be based on in rem or in personam jurisdiction. In personam jurisdiction may be based on the person's presence in the state, or on his conduct in the state, as set out in § 16-4-101 (c).

(n) The following additional provisions shall apply to in personam forfeiture proceedings:

(1) A temporary restraining order under this section may be entered ex parte on application of the state, upon a showing that:

(i) There is probable cause to believe that the property with respect to which the order is sought is subject to forfeiture under this section; and

(ii) Notice of the action would jeopardize the availability of the property for forfeiture.

(2) Notice of the entry of a temporary restraining order and an opportunity for hearing must be afforded to persons known to have an interest in the property. The hearing must be held at the earliest possible date consistent with A.R.C.P. Rule 65 and is limited to the issues of whether:

(i) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, conveyed, alienated, encumbered, disposed of, received, removed from the jurisdiction of the court, concealed, or otherwise made unavailable for forfeiture; and

(ii) The need to preserve the availability of property through the entry of the requested order outweighs the hardship on any owner

or interest holder against whom the order is to be entered.

(3) The state has the burden of proof by a preponderance of the evidence to show that the defendant's property is subject to forfeiture.

(4) On a determination of liability of a person for conduct giving rise to forfeiture under this section, the court shall enter a judgment of forfeiture of the property subject to forfeiture as alleged in the complaint and may authorize the prosecuting attorney or any law enforcement officer to seize all property subject to forfeiture pursuant to subsection (a) of this section not previously seized or not then under seizure. The order of forfeiture shall be consistent with subsection (k) of this section. In connection with the judgment, the court, on application of the state, may enter any appropriate order to protect the interest of the state in property ordered forfeited.

(5) Subsequent to the finding of liability and order of forfeiture, the following procedures apply:

(i) The attorney for the state shall give notice of pending forfeiture, in the manner provided in A.R.C.P. Rule 4, to all owners and interest holders who have not previously been given notice;

(ii) An owner of or interest holder in property that has been ordered forfeited and

whose claim is not precluded may file a claim within thirty (30) days after initial notice of pending forfeiture or after notice under A.R.C.P. Rule 4, whichever is earlier;

(iii) The court may amend the in personam order of forfeiture if the court determines that a claimant has established that he or she has an interest in the property and that that interest is exempt under subdivision (a)(4), (6), or (7) of this section.

(o) The court shall order the forfeiture of any other property of a claimant or defendant up to the value of the claimant's or defendant's property found by the court to be subject to forfeiture under subsection (a) of this section if any of the forfeitable property had remained under the control or custody of the claimant or defendant and:

(1) Cannot be located;

(2) Was transferred or conveyed to, sold to, or deposited with a third party;

(3) Is beyond the jurisdiction of the court;

(4) Was substantially diminished in value while not in the actual physical custody of the seizing agency;

(5) Was commingled with other property that cannot be divided without difficulty; or

(6) Is subject to any interest exempted from forfeiture under this subchapter.

Ark. Code Ann. § 5-64-506.

(a) It is not necessary for the state to negate any exemption or exception in subchapters 1-6 of this chapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under subchapters 1-6 of this chapter. The burden of proof of any exemption or exception is upon the person claiming it.

(b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under subchapters 1-6 of this chapter, he is presumed not to be the holder of the registration or form. The burden of proof is upon him to rebut the presumption.

(c) No liability is imposed by subchapters 1-6 of this chapter upon any authorized state, county, or municipal officer, engaged in the lawful performance of his duties.

Ark. Code Ann. § 5-64-509.
(Repealed by Ark. Act 1120 of 1999)

(a) This section shall be known as the "Uncontested Forfeiture Act."

(b) Property may be proceeded against by uncontested forfeiture only if said property is otherwise subject to forfeiture under § 5-64-505 and if its cumulative appraised value is less than one hundred thousand dollars ($100,000). "Appraised value" means the average retail value of the property at the time and place of seizure.

(c)(1) Within thirty (30) days of the seizure of the property for forfeiture, the prosecuting attorney shall mail a notice to proceed by uncontested forfeiture by registered or certified mail to all known owners and interest holders of the

seized property. Reasonable efforts shall be made to locate all parties with any interest in the property.

(2) The notice to proceed by uncontested forfeiture shall:

(A) Describe the property, including identification, or serial numbers, if any;

(B) State the appraised value of the property, the date, place, and cause of the seizure;

(C) State that, if an owner does not within thirty (30) days from the first date of receipt of the letter file with the prosecuting attorney at the provided address a notice for judicial referral of forfeiture in order to terminate the uncontested forfeiture proceeding and cause the referral of the case for judicial forfeiture, the property will be forfeited without contest; and

(D) State that an owner or interest holder may file a notice for judicial referral with the prosecuting attorney within thirty (30) days of the first date of receipt of the letter.

(d) If the property owner or interest holder wishes to contest, then they shall file with the prosecuting attorney a notice for judicial referral of a forfeiture containing the following:

(1) A statement describing the property and showing petitioner's interest in the property, with supporting documents to establish such interest; and

(2) A certification by the property owner or interest holder stating that he has read the document and that this is not filed for any improper reason such as delay or harassment.

(e)(1) If actual notice, by registered or certified mail, is not perfected as required in subsection (d) of this section, uncontested forfeiture may occur only after the prosecuting attorney publishes a notice of seizure and intent to forfeit in a newspaper of general circulation in the area of seizure once a week for three (3) consecutive weeks.

(2) The publication shall:

(A) Describe the property, including identification, or serial numbers, if any;

(B) State the appraised value of the property, the date, place, and cause of the seizure;
(C) State that, if an owner does not within thirty (30) days from the first date of publication file with the prosecuting attorney at the provided address a notice for judicial referral of a forfeiture in order to terminate the uncontested forfeiture proceeding and cause the referral of the case for judicial forfeiture, the property will be forfeited without contest; and

(D) State that an owner or interest holder may file a notice for judicial referral with the prosecuting attorney within thirty (30) days of the first date of publication.

(f)(1) If the prosecuting attorney does not receive a notice of judicial referral from the owner of the property or from an interest holder contesting ownership interest in said

property within thirty (30) days of the first date of publication of the notice of seizure and intent to forfeit, the seized property will be deemed to be forfeited without contest.

(2) The prosecuting attorney will then execute an order of forfeiture, which will include the following:

(A) The date of the order;

(B) The description of the property, including identification and serial numbers, if any;

(C) The appraised value of the property, the date, place, and cause of the seizure;

(D) The name of the newspaper where publication was made, and the three (3) dates of publication;

(E) A statement of reasonable effort made to locate owners and interest holders, and the date the notice of seizure was mailed to owners and interest holders;

(F) A statement that the property is declared to be forfeited since no notice of judicial referral was received by the prosecuting attorney within thirty (30) days from the first date of letter or newspaper publication; and

(G) The signature of the prosecuting attorney.

(g) The executed order of forfeiture will have the same force and effect as a court decree of forfeiture, and may be used by any official or private party to obtain title or registration; or

to establish, transfer, or quiet title to such property. It will be filed with the circuit clerk and filed under the name of the owner.

(h)(1) The disposition of the uncontested property which has been forfeited pursuant to the order of forfeiture shall be distributed in the same manner as is currently provided for in § 5-64-505 (k).

(2) The property management provisions of § 5-64-505 (j) shall apply to any pending uncontested forfeiture.

(i) Nothing contained herein shall preclude the property owner or the interest holder from entering into an agreement whereby the property is forfeited and an order of forfeiture is entered without the foregoing notice requirements.

Ark. Act 1120 of 1999 (Amending Ark. Code Ann. § 5-64-505 and repealing Ark. Code Ann. § 5-64-509) (Approved April 5, 1999)

AN ACT TO AMEND ARKANSAS CODE 5-64-505 PERTAINING TO THE FORFEITURE OF PROPERTY UNDER THE UNIFORM CONTROLLED SUBSTANCES ACT; TO REPEAL ARKANSAS CODE 5-64-509; AND FOR OTHER PURPOSES.

Subtitle

PERTAINING TO THE FORFEITURE OF PROPERTY UNDER THE UNIFORM CONTROLLED SUBSTANCES ACT; TO REPEAL ARKANSAS CODE 5-64-509.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Legislative intent. As stated in the comment to section 505 of the Uniform Controlled Substances Act, "Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers in committing violations under this act. The reasoning is to prevent their use in the commission of subsequent offenses involving transportation or concealment of controlled substances and to deprive the drug trafficker of needed mobility." The General Assembly recognizes the importance of asset forfeiture as a means to confront drug trafficking. However, the General Assembly also recognizes that under the system that existed prior to the enactment of this act, the lack of uniformity and accountability in forfeiture procedures across the state has undermined confidence in the system. As the United States Supreme Court has stated, "Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly." In order to alleviate the problems resulting from the lack of uniformity and accountability, the General Assembly has determined that time limits for initiating forfeiture proceedings and stricter controls over forfeited property will help alleviate such problems while strengthening forfeiture as a vital weapon against drug trafficking. Specifically, it is the intent of § 5-64-505(a) that there be no forfeitures based solely upon a misdemeanor possession of a controlled substance. However, if the prosecuting attorney can prove that other evidence exists to establish a basis for forfeiture, the property may be forfeited.

It is the intent of § 5-64-505(d) to reduce the conflict between state and federal authorities over seizures executed by state law enforcement officers. It is the intent of § 5-64-505(h) to allow law enforcement agencies and drug task forces to maintain forfeited property for official use, provided that the final order disposing of such property defines the legal entity that is responsible for such property. Section 5-64-505(i)(1)(D) governs those situations in which a seizure results in the forfeiture of money and or property in excess of two hundred fifty thousand dollars ($250,000). It is the specific intent of the General Assembly that forfeiture proceedings not be structured in such a way as to defeat the General Assembly's intent that money or property in excess of two hundred fifty thousand dollars ($250,000) be transferred to the Special State Assets Forfeiture Fund. It is determined that such fund can best be used to combat drug trafficking statewide.

SECTION 2. Arkansas Code 5-64-505 is amended to read as follows:

5-64-505. Property subject to forfeiture - Procedure - Disposition of property.

(a) Items subject to forfeiture. The following are subject to forfeiture upon the initiation of a civil proceeding filed by the prosecuting attorney and when so ordered by the circuit court in accordance with this section, provided that no property shall be subject to forfeiture based solely upon a misdemeanor possession of a Schedule III, IV, V, or VI controlled substance:

(1) All controlled substances and counterfeit substances which have been manufactured, distributed, dispensed, or acquired in violation of this chapter;

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or counterfeit substance in violation of this chapter;

(3) All property which is used, or intended for use, as a container for property described in subdivision (a)(1) or (2);

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in subdivision (a)(1) or (2), but:

(A) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;

(B)No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent. Upon such showing by the owner or interest holder, the conveyance may nevertheless be forfeited if the prosecuting attorney establishes that the owner or interest holder either knew or should reasonably have known that the conveyance would be used to transport or in any manner to facilitate the transportation, for the purpose of sale or receipt, of property described in subsection (a)(1) or (2);

(C) A conveyance is not subject to forfeiture for a violation of § 5-64-401(c); and

(D) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.

(5) All books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this chapter.

(6) Everything of value furnished or intended to be furnished in exchange for a controlled substance or counterfeit substance in violation of this chapter, all proceeds and profits traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner by reason of any act or omission established by him, by a preponderance of the evidence, to have been committed or omitted without his knowledge or consent.

REBUTTABLE PRESUMPTIONS. All moneys, coin, and currency found in close proximity to forfeitable controlled substances, to counterfeit substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture, or distribution of controlled substances or counterfeit substances are presumed to be forfeitable under this paragraph. The burden of proof is upon claimants of the property to rebut these presumptions by a preponderance of the evidence.

(7) Real property may be forfeited under this chapter if it substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any act prohibited by this chapter, except that:

(A) No real property is subject to forfeiture under this chapter by reason of any act or omission established by the owner thereof by a preponderance of the evidence to have been committed or omitted without his knowledge or consent;

(B) Real property is not subject to forfeiture for a violation of § 5-64-401(c); and

(C) A forfeiture of real property encumbered by a mortgage or other lien is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the unlawful act or omission.

(D) Upon conviction, when the circuit court having jurisdiction over the real property seized finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this section, the court shall enter an order consistent with subsection (h) of this section.

(E) When any court orders a forfeiture of real property pursuant to this chapter, the order shall be filed of record on the day issued and shall have prospective effect only.

(F) A forfeiture of real property ordered under the provisions of this chapter shall not affect the title of a bona fide purchaser who purchased the

property prior to the issuance of the order, and such order shall have no force or effect on the title of the bona fide purchaser.

(G) Any lis pendens filed in connection with any action pending under the provisions of this chapter which might result in the forfeiture of real property shall be operative only from the time filed and shall have no retroactive effect.

(b) Seizure and summary forfeiture of contraband. The following items shall be deemed contraband and may be seized and summarily forfeited to the state:

(1) Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this chapter and controlled substances listed in Schedule I which are seized or come into the possession of the state, the owners of which are unknown.

(2) Species of plants from which controlled substances in Schedules I, II, and VI may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths. The failure, upon demand by the seizing law enforcement agency, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, constitutes authority for the seizure and forfeiture of the plants.

(3) All drug paraphernalia and counterfeit substances except in the possession or control of a practitioner in the course of professional practice and/or research.

(c) Seizure of property. Property subject to forfeiture under this chapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the property on petition filed by the prosecuting attorney of the judicial circuit. Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(3) The seizing law enforcement agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The seizing law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(d) Transfer of property seized by state or local agency to federal agency. No state or local law enforcement agency may transfer any property seized by the state or local agency to any federal entity for forfeiture under federal law unless the circuit court having jurisdiction over the property enters an order, upon petition by the prosecuting attorney, authorizing the property to be transferred to such federal entity. Such transfer shall not be approved unless it reasonably appears that the activity giving rise to the investigation or seizure involves more than one state or the nature of the investigation or seizure would be better pursued under federal law.

(e)(1) Custody of property pending disposition. Property seized for forfeiture under this section shall not be subject to

replevin, but is deemed to be in the custody of the seizing law enforcement agency subject only to the orders and decrees of the circuit court having jurisdiction over the property seized. When property is seized under this chapter, the seizing law enforcement agency may, subject to any need to retain the property as evidence:

(A) Remove the property to a place designated by the circuit court;

(B) Place the property under constructive seizure posting notice of pending forfeiture on it, by giving notice of pending forfeiture to its owners and interest holders, or by filing notice of pending forfeiture in any appropriate public record relating to the property;

(C) Remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, or is not needed for evidentiary purposes, deposit it in an interest-bearing account; or

(D) Provide for another agency or custodian, including an owner, secured party, mortgagee, or lienholder, to take custody of the property and service, maintain, and operate it as reasonably necessary to maintain its value in any appropriate location within the jurisdiction of the court.

(2) In all cases of transfer of property, a transfer receipt shall be prepared by the transferring agency. The transfer receipt shall list a detailed and complete description of the property being transferred. The transfer receipt shall also state to whom the property is being transferred and the source or authorization for the

transfer. The transfer receipt shall be signed by both the transferor and the transferee. Both transferor and transferee shall maintain a copy of the transfer receipt.

(3) A person who acts as custodian of property under this section is not liable to any person on account of acts done in compliance with an order under this chapter in a reasonable manner.

(f) Inventory of property seized - Referral to prosecuting attorney.

(1) Any property seized by state or local law enforcement officers who are detached to, deputized or commissioned by, or working in conjunction with a federal agency shall remain subject to the provisions of this section.

(2) When property is seized for forfeiture by a law enforcement agency, the seizing officer shall prepare and sign a confiscation report. The party from whom the property is seized shall also sign the report if present and shall immediately receive a copy of it. If the party refuses to sign the report, the report shall be signed by one (1) additional law enforcement officer, stating that the party refused to sign the report. The original report shall be filed with the seizing law enforcement agency within forty-eight (48) hours after the seizure and shall be maintained in a separate file. One (1) copy of the report shall be retained by the seizing officer.

(3) The confiscation report shall contain the following information:

(A) A detailed description of the property seized including any serial or model numbers;

(B) The date of seizure;

(C) The name and address from whom the property was seized;

(D) The reason for the seizure;

(E) Where the property will be held;

(F) The seizing officer's name; and

(G) A signed statement by the seizing officer stating that the report is true and complete.

(4) Within three (3) business days of receiving the confiscation report, the seizing agency shall forward a copy of the report to the prosecuting attorney for the district in which the property was seized and to the Arkansas Drug Director.

(5)(A) If the Division of Legislative Audit determines, by its own investigation or upon written notice from the Arkansas Drug Director, that (i) a law enforcement agency has failed to complete and file the confiscation reports as required by this section, (ii) that a law enforcement agency, prosecuting attorney, or other public entity has not properly accounted for any seized property, or (iii) that a prosecuting attorney has failed to comply with the notification requirement set forth in subsection (i)(1), the Division of Legislative Audit shall notify the circuit court in the county of such entity and the Arkansas Alcohol and Drug Abuse Coordinating Council that the entity is thereafter ineligible to receive any forfeited funds, forfeited property, or any grants from the council. The court shall thereafter not issue any orders distributing seized property to that entity nor

shall any grants be awarded by the council to that entity until the appropriate officials of the entity have appeared before the Legislative Joint Auditing Committee and the committee has adopted a motion authorizing subsequent transfers of forfeited property to the entity.

(B) While an entity is ineligible to receive forfeited property, the court shall order any money that would have been distributed to that entity to be transmitted to the Treasurer of State for deposit into the Crime Lab Equipment Fund, and if the property is other than cash, the court shall order it converted to cash pursuant to subdivision (h)(1)(B), and the proceeds transmitted to the Treasurer of State for deposit into the Crime Lab Equipment Fund.

(C) Monies deposited into the Crime Lab Equipment Fund pursuant to subdivision (f)(5)(B) are not subject to recovery or retrieval by the ineligible entity.

(g) Initiation of forfeiture proceedings - notice to claimants - judicial proceedings.

(1) The prosecuting attorney shall initiate forfeiture proceedings by filing a complaint with the circuit clerk of the county in which the property was seized and by serving such complaint on all known owners and interest holders of the seized property in accordance with the Arkansas Rules of Civil Procedure. The complaint may be based on in rem or in personam jurisdiction but shall not be filed in such a way as to avoid the distribution requirements set forth in subdivision (i)(1).

(2) The complaint shall include a copy of the confiscation report and shall be filed within sixty (60) days after receiving a copy of the confiscation report from the seizing law enforcement agency. In cases involving real property, the complaint shall be filed within sixty (60) days of the defendant's conviction on the charge giving rise to the forfeiture.

(3) The prosecuting attorney may file the complaint after the expiration of the time set forth in subdivision (g)(2) only if the complaint is accompanied by a statement of good cause for the late filing. However, in no event shall the complaint be filed more than one hundred twenty (120) days after either the date of the seizure or, in cases involving real property, the date of the defendant's conviction. If the court determines that good cause has not been established, the court shall order that the seized property be returned to the owner or interest holder.

(4) Within the time set forth in the Arkansas Rules of Civil Procedure, the owner or interest holder of the seized property shall file with the circuit clerk a verified answer to the complaint which shall include:

(A) A statement describing the property and the petitioner's interest in the property, with supporting documents to establish such interest;

(B) A certification by the owner or interest holder stating that he has read the document and that it is not filed for any improper purpose;

(C) A statement setting forth any defenses to forfeiture; and

(D) The address at which the owner or interest holder will accept mail.

(5)(A) If the owner or interest holder fails to file an answer as required by subdivision (g)(4), the prosecuting attorney may move for default judgment pursuant to the Arkansas Rules of Civil Procedure.

(B) If a timely answer has been filed, the prosecuting attorney shall have the burden of proving by a preponderance of the evidence that the seized property should be forfeited. After the prosecuting attorney has presented such proof, any owner or interest holder of the property seized shall be allowed to present evidence why such property should not be forfeited. If the court determines that grounds for forfeiting the property exist and that no defense to forfeiture has been established by the owner or interest holder, the court shall enter an order pursuant to subsection (h). However, if the court determines either that the prosecuting attorney has failed to establish that such grounds exist or that the owner or interest holder has established a defense to forfeiture, the court shall order that the property be immediately returned to the owner or interest holder.

(h) Final disposition. (1) When the circuit court having jurisdiction over the property seized finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this chapter, the court shall enter an order:

(A) To permit the law enforcement agency or prosecuting attorney to retain the property for

law enforcement or prosecutorial purposes, subject to the following provisions:

(i) Property may not be retained for official use for more than two (2) years, unless the circuit court finds that the property has been used for law enforcement or prosecutorial purposes and authorizes continued use for such purposes on an annual basis. At the end of the period of retention, the property shall be sold as provided in subdivision (h)(1)(B), and eighty percent (80%) of the proceeds shall be deposited in the drug control fund of the retaining agency and twenty percent (20%) of the proceeds shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund. Nothing shall prohibit the retaining agency from selling the retained property at any time during the time allowed for retention, provided that the proceeds of such sale shall be distributed as set forth in this paragraph;

(ii) If the circuit court determines that retained property has been used for personal use or by non-law enforcement personnel for non-law enforcement purposes, the court shall order the property to be sold pursuant to the provisions of Arkansas Code § 5-5-101(e) and (f), and the proceeds shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund;

(iii) Drug task forces may use forfeited property or money, provided that the court's order specifies that the money or property is forfeited to the prosecuting attorney, sheriff, chief of police, or Arkansas State Police, or Arkansas Highway Police. The prosecuting attorney, sheriff, chief of police, or Arkansas State Police, or Arkansas Highway Police shall thereafter maintain an inventory of such property, shall be accountable for such property, and shall be subject to the provisions of subsection (f)(5) with respect to such property;

(iv) All aircraft shall be forfeited to the Office of the Arkansas Drug Director and may only be used for drug eradication or drug interdiction efforts, within the discretion of the Arkansas Drug Director. However, if the Arkansas Alcohol and Drug Abuse Coordinating Council determines that the aircraft should be sold, such sale shall be conducted pursuant to the provisions of § 5-5-101(e) and (f), and the proceeds of such sale shall be deposited in the Special State Assets Forfeiture Fund;

(v) All firearms not retained for official use shall be disposed of in accordance with state and federal law;

(vi) All controlled substances, plants, drug paraphernalia, and counterfeit substances shall be destroyed pursuant to court order;

(B) To sell that which is not required by law to be destroyed and which is not harmful to the public. Such property shall be sold at a public sale, by the retaining agency, pursuant to the provisions of § 5-5-101(e) and (f);

(2) Disposition of forfeited property pursuant to this subsection shall be subject to the need to retain the property as evidence in any related proceedings;

(3) Within three (3) business days of the entry of the order, the circuit clerk shall forward to the Arkansas Drug Director copies of the confiscation report, the court's order, and any other documentation detailing the disposition of the seized property.

(i) Disposition of moneys received. Subject to the provisions of subsection (f)(5), the proceeds of sales conducted pursuant to subsection (h)(1)(B) and all moneys forfeited or obtained by judgment or settlement pursuant to this chapter shall be deposited and distributed in the manner set forth in this subsection. Moneys received from federal forfeitures shall be deposited and distributed pursuant to subdivision (4) of this subsection.

(1) Asset Forfeiture Fund. (A) The proceeds of any sale and any moneys forfeited or obtained by judgment or settlement under this chapter shall be deposited in the asset forfeiture fund of the prosecuting attorney and shall be subject to the following provisions:

(i) If, during a calendar year, the aggregate amount of moneys deposited in the asset forfeiture fund exceeds twenty thousand dollars ($20,000) per county, the prosecuting attorney shall, within fourteen (14) days of

that time, notify the circuit judges in the judicial district and the Arkansas Drug Director;

(ii) Subsequent to the notification set forth in (i), twenty percent (20%) of the proceeds of any additional sale and any additional moneys forfeited or obtained by judgment or settlement under this chapter in the same calendar year shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund and the remainder shall be deposited in the asset forfeiture fund of the prosecuting attorney;

(iii) Failure by the prosecuting attorney to comply with the notification requirement set forth in (i) shall render the prosecuting attorney and any entity eligible to receive forfeited moneys or property from the prosecuting attorney ineligible to receive such moneys or property, except as provided in subsection (f)(5)(A);

(iv) Twenty percent (20%) of any moneys in excess of twenty thousand dollars ($20,000) that have been retained but not reported as required by (i) shall be subject to recovery for deposit into the Crime Lab Equipment Fund.

(B) The prosecuting attorney shall administer expenditures from the fund which shall be subject to audit by the Division of Legislative Audit. Moneys distributed from this fund must only be used for law enforcement and

prosecutorial purposes. Moneys in the fund must be distributed in the following order:

(i) For satisfaction of any bona fide security interest or lien;

(ii) For payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs;

(iii) Any balance under two hundred fifty thousand dollars ($250,000) shall be distributed proportionally so as to reflect generally the contribution of the appropriate local or state law enforcement or prosecutorial agency's participation in any of the activities that led to the seizure or forfeiture of the property or deposit of moneys under this chapter; and

(iv) Any balance over two hundred fifty thousand dollars ($250,000) shall be forwarded to the Arkansas Drug Director to be transferred to the State Treasury for deposit in the Special State Assets Forfeiture Fund for distribution as provided in subdivision (3) of this subsection.

(2) Drug Control Fund. (A) There is created on the books of law enforcement agencies and prosecuting attorneys a Drug Control Fund. The Drug Control Fund shall consist of all moneys obtained under subdivision (1) and other revenues as may be provided by law or ordinance. Moneys from the fund may not supplant other local, state or federal funds. Moneys in this fund are

appropriated on a continuing basis and are not subject to the Revenue Stabilization Law, § 19-5-101 et seq. Moneys in this fund must only be used for law enforcement and prosecutorial purposes. The fund is subject to audit by the Division of Legislative Audit.

(B) The law enforcement agencies and prosecuting attorneys shall submit to the Arkansas Drug Director on or before January 1 and July 1 of each year a report detailing all moneys received and expenditures made from the Drug Control Fund during the preceding six-month period.

(3) Special State Assets Forfeiture Fund. (A) There is created and established on the books of the State Treasurer, the State Auditor, and the Chief Fiscal Officer of the State a fund to be known as the Special State Assets Forfeiture Fund.

(B) The Special State Assets Forfeiture Fund shall consist of revenues obtained under subdivision (i)(1)(B)(iv) and any other revenues as may be provided by law. Moneys from the fund may not supplant other local, state, or federal funds.

(C) This fund shall not be subject to the provisions of the Revenue Stabilization Law, § 19-5-101 et seq., or the Special Revenue Fund Account, § 19-5-203(b)(2)(A).

(D) The Arkansas Drug Director shall establish through rules and regulations a procedure for proper investment, use, and disposition of moneys deposited in the special

asset forfeiture fund in accordance with the intent and purposes of subchapters 1-6 of this chapter. Moneys in this fund shall be distributed by the Arkansas Alcohol and Drug Abuse Coordinating Council and shall only be distributed for law enforcement and prosecutorial purposes related to drug interdiction and eradication efforts.

(4) Federal Forfeitures. (A) All moneys received by prosecuting attorneys and law enforcement agencies from federal forfeitures shall be deposited and maintained in a separate account, provided that any balance over two hundred fifty thousand dollars ($250,000) shall be distributed as set forth in (B). No other moneys may be maintained in such account except for any interest income generated by such account. Moneys in this account must only be used for law enforcement and prosecutorial purposes consistent with governing federal law. Such accounts shall be subject to audit by the Division of Legislative Audit.

(B) Any balance over two hundred fifty thousand dollars ($250,000) shall be forwarded to the Arkansas Drug Director to be transferred to the State Treasury for deposit in the Special State Assets Forfeiture Fund where it shall be maintained separately and distributed consistent with governing federal law.

(j) In personam proceedings. In personam jurisdiction may be based on the person's presence in the state, or on his conduct in the state, as set out in § 16-4-101(c), and is subject to the following additional provisions:

(1) A temporary restraining order under this section may be entered ex parte on application of the state, upon a showing that:

(A) There is probable cause to believe that the property with respect to which the order is sought is subject to forfeiture under this section; and

(B) Notice of the action would jeopardize the availability of the property for forfeiture.

(2) Notice of the entry of a temporary restraining order and an opportunity for hearing must be afforded to persons known to have an interest in the property. The hearing must be held at the earliest possible date consistent with A.R.C.P. Rule 65 and is limited to the issues of whether:

(A) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, conveyed, alienated, encumbered, disposed of, received, removed from the jurisdiction of the court, concealed, or otherwise made unavailable for forfeiture; and

(B) The need to preserve the availability of property through the entry of the requested order outweighs the hardship on any owner or interest holder against whom the order is to be entered.

(3) The state has the burden of proof by a preponderance of the evidence to show that the defendant's property is subject to forfeiture.

(4) On a determination of liability of a person for conduct giving rise to forfeiture under this section, the court shall enter a judgment of forfeiture of the property subject to forfeiture as alleged in the complaint and may authorize the prosecuting attorney or any law enforcement officer to seize all property subject to forfeiture pursuant to subsection (a) of this section not previously seized or not then under seizure. The order of forfeiture shall be consistent with subsection (h) of this section. In connection with the judgment, the court, on application of the state, may enter any appropriate order to protect the interest of the state in property ordered forfeited.

(5) Subsequent to the finding of liability and order of forfeiture, the following procedures apply:

(A) The attorney for the state shall give notice of pending forfeiture, in the manner provided in A.R.C.P. Rule 4, to all owners and interest holders who have not previously been given notice;

(B) An owner of or interest holder in property that has been ordered forfeited and whose claim is not precluded may file a claim within thirty (30) days after initial notice of pending forfeiture or after notice under A.R.C.P. Rule 4, whichever is earlier;

(C) The court may amend the in personam order of forfeiture if the court determines that a claimant has established that he or she has an interest in the property and that that interest is exempt under subdivision (a)(4), (6), or (7) of this section.

(k) The court shall order the forfeiture of any other property of a claimant or defendant up to the value of the claimant's or defendant's property found by the court to be subject to forfeiture under subsection (a) of this section if any of the forfeitable property had remained under the control or custody of the claimant or defendant and:

(1) Cannot be located;

(2) Was transferred or conveyed to, sold to, or deposited with a third party;

(3) Is beyond the jurisdiction of the court;

(4) Was substantially diminished in value while not in the actual physical custody of the seizing agency;

(5) Was commingled with other property that cannot be divided without difficulty; or

(6) Is subject to any interest exempted from forfeiture under this subchapter.

SECTION 3. There is hereby created the Crime Lab Equipment Fund on the books of the Auditor of State, Treasurer of State, and Chief Fiscal Officer of the State. The monies in the fund shall only be used by the State Crime Laboratory for the purchase of equipment.

SECTION 4. Arkansas Code 5-64-509 is hereby repealed.

SECTION 5. Arkansas Code 16-21-148 is amended to read as follows:

16-21-148. Deputy prosecutor for civil asset forfeiture actions.

(a) In addition to the deputy prosecuting attorney positions created by § 16-21-113(a)(1) and other Arkansas Code provisions and laws, a prosecuting attorney shall have the power to enter into a contract for personal services with a licensed attorney whose duty it will be to act as a deputy prosecutor to prosecute civil asset forfeiture actions at such hourly amount as is deemed proper by the prosecuting attorney.

(b) This attorney may be paid from funds generated from § 5-64-505(i)(2).

SECTION 6. Arkansas Code 19-5-972 is amended to read as follows:

19-5-972. Special State Assets Forfeiture Fund.

(a) There is hereby established on the books of the Treasurer of State, Auditor of State, and Chief Fiscal Officer of the State a fund to be known as the Special State Assets Forfeiture Fund.

(b) Such fund shall consist of revenues as provided in § 5-64-505(i)(1)(B)(iv) and any other revenues as may be provided by law, there to be administered through rules and regulations established by the Arkansas Drug Director and distributed by the Arkansas Drug and Alcohol Abuse Coordinating Council in accordance with the intent and purposes of chapter 64, title 5, of the Arkansas Code.

SECTION 7. Arkansas Code 16-21-147(d) is amended to read as follows:

(d) All federal forfeitures to a prosecuting attorney's office shall be deposited in a separate account pursuant to § 5-64-505(i)(4).

SECTION 8. All provisions of this Act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 9. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 10. All laws and parts of laws in conflict with this Act are hereby repealed.

VI. PORTIONS OF RECORD WHERE FEDERAL QUESTIONS RAISED AND RULED UPON

A. WHERE RAISED

CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Motion To Vacate Order
(Filed March 20, 1998) (R. 27-33)

Comes now the Movant, Arkansas Highway Police, by and through its attorneys, Robert L. Wilson, Chief Counsel, William L. Wharton, Calvin R. Gibson, and Lawrence W. Jackson, and for its Motion to Vacate Order states and alleges:

1. On March 18, 1998, at 5:05 p.m., after the close of regular business hours and without any notice or even a phone call to Movant's counsel, Movant received a faxed copy of an Order (the "*Ex Parte* Order"), which apparently had been signed on March 17, 1998, and entered on March 18, 1998. The *Ex Parte* Order was faxed to the office of the Chief of the Arkansas Highway Police, but copies have never been provided to Movant's counsel by the Plaintiff's counsel. Based on the contents of the *Ex Parte* Order, Movant believes that the Court was not fully advised of the facts and circumstances surrounding these proceedings.

2. The *Ex Parte* Order makes reference to "Three Million One Hundred Sixty Six [*sic*] One Hundred Ninety Nine ($3,166,199.00)", which was seized on March 7, 1998, by the Arkansas Highway Police in Crittenden County, Arkansas. As correctly noted in the *Ex Parte* Order, the money was transported to the Arkansas Highway Police Headquarters in Little Rock, Arkansas. The amount of currency seized and transported was Three Million One Hundred Sixty Six Thousand One Hundred Ninety Nine Dollars ($3,166,199.00) (the "Money").

3. As the seizing agency, Movant is a party in interest and is entitled to notice in these proceedings. Furthermore, because the Money is now property of the United States and in the possession of Federal law enforcement agencies, the United States is a party in interest and a necessary party to these proceedings, although it is doubtful that the Court or Prosecutor possess jurisdiction over United States property in the custody and control of the United States.

4. The *Ex Parte* Order directs the Arkansas Highway Police to "deposit said currency in a Federally Insured Depository and said U. S. Currency is to be wired into P. A. Drug Asset Holding Account located at the Citizen's Bank in Marion, Crittenden County, Arkansas bearing account number 189100 and forwarded within ten (10) days of this Order."

5. The *Ex Parte* Order was apparently entered upon an *ex parte* motion submitted to the Court by James C. Hale, III. The *Ex Parte* Order was obtained and entered without notice to Movant. Because the *Ex Parte* Order was obtained without notice, the Court was apparently misinformed about several relevant facts.

6. First, the Arkansas Highway Police is the seizing agency for the purposes of State and Federal forfeiture laws and, as such, elected to have any forfeiture action prosecuted

by Federal authorities in Federal court. United States Drug Enforcement Agency ("DEA") administrative forfeiture proceedings have already begun. Neither the Crittenden County Prosecutor nor this Court possess jurisdiction or authority to second-guess Movant's election.

7. Second, as a courtesy, the Crittenden County Prosecutor was informed of the seizure. Also, as a courtesy, Movant requested the Crittenden County Prosecutor's agreement to the transfer of the Money to Little Rock and the Federal prosecution of any forfeiture action. James C. Hale, Jr., expressly agreed to the transfer and Federal prosecution. Mr. Hale expressed his agreement to William L. Wharton, one of Movant's attorneys, among others, and, accordingly, had actual knowledge that Movant was represented by counsel, as well as the identity, address, and phone number of Movant's counsel.

8. Third, the Money is no longer in the possession or control of the Arkansas Highway Police. After being transported to Arkansas Highway Police Headquarters shortly after it was seized and in reliance upon the agreement with the Crittenden County Deputy Prosecuting Attorney, the Money was subsequently placed in a Federally Insured Depository and turned over to the DEA. The Money has since been transferred to the custody and control of the United States Marshal. Accordingly, the Court no longer possesses jurisdiction over the *res*.

9. Fourth, on two different occasions (so far) some of the currency has been determined to be counterfeit. Accordingly, it is Movant's belief that the counterfeit currency has been, or is being, forwarded to the Federal Reserve Bank, at which point it will be forwarded to the United States Secret Service for further investigation.

10. Fifth, Plaintiff's attorney agreed and acquiesced to the transfer of the Money and Movant's election to have this matter prosecuted by Federal authorities, and further knew the identity and phone number of Movant's counsel. Nevertheless, Movant was afforded no notice of Plaintiff's motion for the *Ex Parte* Order.

11. Sixth, Movant objects to the *Ex Parte* Order. Movant cannot comply with the *Ex Parte* Order and the Court now lacks jurisdiction to compel Movant to transfer the Money even if it were still in Movant's possession or control.

12. Seventh, the Money was and is property of the United States pursuant to 21 U.S.C. § 881(h).

13. Eighth, the Money was seized during a consensual search of a commercial motor vehicle in interstate commerce while Movant's employees and agents were acting in their capacity as agents of the Federal Government in the enforcement of United States Department of Transportation regulations regarding the operation of interstate motor carriers. While engaged in such duties, Movant's employees and agents were serving in dual capacities under both Federal and State authority.

14. The *Ex Parte* Order resulted from an apparent motion that was improper and violated Ark. R. Civ. P. 65 and Rules 3.3, 3.4, & 3.5 of the Model Rules of Professional Conduct. Even though the Crittenden County Deputy Prosecuting Attorney knew Movant was represented by counsel, the Deputy Prosecuting Attorney communicated directly with the agents and employees of Movant without the consent of counsel. Given the adversarial nature that the Deputy Prosecuting Attorney has elected to instill into these proceedings, such communications were in violation of Rule 4.2 of the Model Rules of Professional Conduct. Furthermore, the Deputy Prosecuting Attorney still has never faxed copies of

any pleadings to Movant's counsel, nor even bothered to call Movant's counsel regarding the *Ex Parte* Order. The motion and *Ex Parte* Order are also in violation of Ark. R. Civ. P. 65, which requires an affidavit or verified complaint alleging irreparable harm, a reasonable effort to provide notice to other parties, and an expedited hearing. The Money has remained securely in the hands of appropriate law enforcement officials and agencies, or their depository, at all times, and no chance of any harm — much less irreparable harm — exists. Plaintiff apparently failed to make any effort to notify Movant because Movant's counsel has been available on March 16, 17, and 18. The *Ex Parte* Order further makes no provision for a hearing on the matter.

15. The *Ex Parte* Order violates Ark. Const. art. 4, which prohibits the Court from exercising the powers of the executive branch. To the extent that Ark. Code Ann. § 5-64-505 permits the Court to enter such orders directing Movant to bring the forfeiture action in either the Federal or State forum, it is unconstitutional as applied. Ark. Const. art. 4; Ark. Const. amend. 42.

16. Movant believes that prosecution of the forfeiture action by Federal authorities in Federal Court under Federal law is more likely to be successful.

17. DEA administrative forfeiture proceedings have already begun. Movant has been advised that DEA form DAG-71 will be forwarded to the Crittenden County Prosecutor's office in the event that it desires to claim a share of the Money.

18. Finally, the vehicle carrying the Money apparently originated in Texas and had traveled between Texas and Ohio. The only connection with Arkansas is that the Money was being transported through the State when it was seized. The Federal agencies are better able to investigate the multi-state

transportation, transactions, and circumstances, not to mention the counterfeit bills that have been discovered.

19. For each and all of the foregoing:

a) the *Ex Parte* Order is void;

b) the Court lacks jurisdiction to have entered the *Ex Parte* Order;

c) Movant cannot possibly comply with the *Ex Parte* Order, even if it were valid;

d) the Crittenden County Prosecuting Attorney is estopped from denying the existence of its agreement to transfer the Money to Little Rock and Federal prosecution of the forfeiture action;

e) the *Ex Parte* Order is unconstitutional; and,

f) the *Ex Parte* Order is moot.

20. Movant requests an emergency hearing at the Court's earliest possible convenience.

THEREFORE, Movant respectfully requests that this action be dismissed or, alternatively, the Order signed March 17, 1998, and entered March 18, 1998, be set aside, vacated, and held for naught.

Respectfully submitted,

/S/ Robert L. Wilson, Chief Counsel

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Motion To Dismiss And, Alternatively, Amended Motion To Vacate Order
(Filed March 27, 1998) (R. 44-52)

Comes now the Movant, Arkansas Highway Police, by and through its attorneys, Robert L. Wilson, Chief Counsel, William L. Wharton, Calvin R. Gibson, and Lawrence W. Jackson, and for its Motion to Dismiss and, Alternatively, Motion to Vacate Order states and alleges:

1. On March 18, 1998, at 5:05 p.m., after the close of regular business hours and without any notice or even a phone call to Movant's counsel, Movant received a faxed copy of an Order (the "*Ex Parte* Order"), which apparently had been signed on March 17, 1998, and entered on March 18, 1998. The *Ex Parte* Order was faxed to the office of the Chief of the Arkansas Highway Police, but copies have never been provided to Movant's counsel by the Plaintiff's counsel. Based on the contents of the *Ex Parte* Order, Movant believes that the Court was not fully advised of the facts and circumstances surrounding these proceedings.

2. The *Ex Parte* Order makes reference to "Three Million One Hundred Sixty Six [*sic*] One Hundred Ninety Nine

($3,166,199.00)", which was seized on March 7, 1998, by the Arkansas Highway Police in Crittenden County, Arkansas. As correctly noted in the *Ex Parte* Order, the money was transported to the Arkansas Highway Police Headquarters in Little Rock, Arkansas. The amount of currency seized and transported was Three Million One Hundred Sixty Six Thousand One Hundred Ninety Nine Dollars ($3,166,199.00) (the "Money").

3. As the initial seizing agency, Movant is a party in interest and is entitled to notice in these proceedings. Furthermore, because the seizure was adopted by the Drug Enforcement Administration ("DEA"), the Money is now property of the United States and in the possession of federal law enforcement agencies, and the United States is a party in interest and a necessary party to these proceedings — although it is doubtful that the Court or Prosecutor possess jurisdiction over United States property in the custody and control of the United States.

4. The *Ex Parte* Order directs the Arkansas Highway Police to "deposit said currency in a Federally Insured Depository and said U. S. Currency is to be wired into P. A. Drug Asset Holding Account located at the Citizen's Bank in Marion, Crittenden County, Arkansas bearing account number 189100 and forwarded within ten (10) days of this Order."

5. The *Ex Parte* Order was apparently entered upon an *ex parte* motion submitted to the Court by James C. Hale, III. The *Ex Parte* Order was obtained and entered without notice to Movant. Because the *Ex Parte* Order was obtained without notice, the Court was apparently misinformed about several relevant facts.

6. First, the Arkansas Highway Police, the initial seizing agency for the purposes of State and federal forfeiture laws, elected to have any forfeiture action prosecuted by federal

authorities in federal court. Agents for the United States Drug Enforcement Agency ("DEA") were contacted immediately upon the seizure of the Money on March 7, 1998, *prior to* contacting the Crittenden County Prosecutor, and administrative forfeiture proceedings have already begun. The Money, the *rem*, was voluntarily and lawfully transferred to federal authorities before either the *Ex Parte* Order was entered or the Complaint in this matter was filed. Therefore, neither the Crittenden County Prosecutor nor this Court possess jurisdiction or authority to second-guess Movant's election. *United States v. $12,390.00*, 956 F.2d 801 (8th Cir. 1992) ("The fact that the government had taken possession of the money and initiated the requisite paperwork for administrative forfeiture is determinative in this case.")

7. Second, as a courtesy, the Crittenden County Prosecutor was informed of the seizure. Also, as a courtesy, Movant requested the Crittenden County Prosecutor's acquiescence agreement to the transfer of the Money to Little Rock and the federal prosecution of any forfeiture action. James C. Hale, Jr., expressly agreed to the transfer and federal prosecution. Mr. Hale expressed his agreement to William L. Wharton, one of Movant's attorneys, among others, and, accordingly, had actual knowledge that Movant was represented by counsel, as well as the identity, address, and phone number of Movant's counsel. Nonetheless, no notice was provided to Movant even though *the Ex Parte* Order directs Movant to return the Money.

8. Third, the Money is no longer in the possession or control of the Arkansas Highway Police. After being transported to Arkansas Highway Police Headquarters shortly after it was seized and in reliance upon the agreement with the Crittenden County Deputy Prosecuting Attorney, the Money was subsequently placed in a Federally Insured Depository and turned over to the DEA. This occurred before the Court either

signed or entered the *Ex Parte* Order, and before even receiving any notice that a motion had been, or was going to be, filed or otherwise made (since there was no notice). The Money, with the possible exception of the counterfeit bills, was transferred by the DEA to the custody and control of the United States Marshall at about the same time, or shortly before, the *Ex Parte* Order was signed. Accordingly, the Court no longer possesses jurisdiction over the res, nor can Movant comply with the *Ex Parte* Order.

9. Fourth, on at least two different occasions (so far) some of the currency has been determined to be counterfeit. Accordingly, it is Movant's belief that the counterfeit currency has been, or is being, forwarded to the Federal Reserve Bank, at which point it will be forwarded to the United States Secret Service for further investigation.

10. Fifth, even assuming that the Court possessed jurisdiction, Plaintiff's attorney agreed and acquiesced to the transfer of the Money and Movant's election to have this matter prosecuted by federal authorities, and further knew the identity and phone number of Movant's counsel. Nevertheless, Movant was afforded no notice of Plaintiff's motion for the *Ex Parte* Order.

11. Sixth, Movant objects to the *Ex Parte* Order. As already stated, Movant cannot comply with the *Ex Parte* Order and the Court now lacks jurisdiction to compel Movant to transfer the Money even if it were still in Movant's possession or control.

12. Seventh, the Money was and is property of the United States pursuant to 21 U.S.C. § 881(h). The Money became property of the United States at the time of the commission of the act that made the Money subject to forfeiture.

13. Eighth, the Money was seized during a consensual search of a commercial motor vehicle in interstate commerce while Movant's employees and agents were acting under authority of both federal and State law regarding the regulation of interstate motor carriers.

14. The *Ex Parte* Order resulted from an apparent motion that was improper and violated Ark. R. Civ. P. 65 and Rules 3.3, 3.4, & 3.5 of the Model Rules of Professional Conduct. Even though the Crittenden County Deputy Prosecuting Attorney knew Movant was represented by counsel, the Deputy Prosecuting Attorney communicated directly with the agents and employees of Movant without the consent of counsel. Given the adversarial spirit that the Deputy Prosecuting Attorney has elected to instill into these proceedings, such communications were also in violation of Rule 4.2 of the Model Rules of Professional Conduct. Furthermore, the Deputy Prosecuting Attorney still has never faxed copies of any pleadings to Movant's counsel, nor even bothered to call Movant's counsel regarding the *Ex Parte* Order. The motion and *Ex Parte* Order are also in violation of Ark. R. Civ. P. 65, which requires an affidavit or verified complaint alleging irreparable harm, a reasonable effort to provide notice to other parties, and an expedited hearing. The Money has remained securely in the hands of appropriate law enforcement officials and agencies, or their depository, at all times, and no chance of any harm — much less irreparable harm — exists. Plaintiff apparently failed to make any effort to notify Movant and Movant's counsel was fully available on March 16, 17, and 18. The *Ex Parte* Order further makes no provision for a hearing on the matter.

15. The *Ex Parte* Order violates Ark. Const. art. 4, which prohibits the Court from exercising the powers of the executive branch. To the extent that Ark. Code Ann. § 5-64-505 permits the Court to enter such orders directing Movant to

bring the forfeiture action in either the federal or State forum, it is unconstitutional as applied. Ark. Const. art. 4; Ark. Const. amend. 42.

16. To the extent that Ark. Code Ann. § 5-64-505 purports to grant the State the authority to seize assets that are part of a pending or anticipated federal forfeiture proceeding it violates the Supremacy Clause of the United States Constitution. In any event, the *Ex Parte* Order is an unconstitutional application of Ark. Code Ann. § 5-64-505.

17. Movant believes that prosecution of the forfeiture action by federal authorities in federal Court under federal law is more likely to be successful.

18. The DEA adopted the seizure and DEA administrative forfeiture proceedings have already begun. DEA agents were contacted by Movant immediately upon the seizure on March 7, 1998. The agents were contacted before the Crittenden County Prosecutor was contacted. The Money was voluntarily transferred out of the Court's territorial jurisdiction and transferred to the DEA. All of this occurred before the *Ex Parte* Order was entered and long before the Complaint was filed in these proceedings. Movant has been advised that DEA form DAG-71 will be forwarded to the Crittenden County Prosecutor's office in the event that it desires share in the distribution of the Money.

19. Finally, the vehicle carrying the Money apparently originated in Texas and had traveled between Texas and Ohio. The only connection with Arkansas is that the Money was being transported through the State when it was seized. The federal agencies are better able to investigate the multi-state transportation, transactions, and circumstances, not to mention the counterfeit bills that have been discovered. It is Movant's belief that the underlying criminal acts giving rise to forfeiture

are more properly characterized as federal in nature and spread over several states.

20. The *Ex Parte* Order directs the "Arkansas Highway Police" to transfer the Money to Crittenden County. No individual official or person was named in the Order and the Court lacks jurisdiction to compel AHP to make such a transfer — even had the Money not already been transferred to the DEA. Ark. Const. art. 5, § 20.

21. For each and all of the foregoing:

a) the *Ex Parte* Order is void;

b) the Court lacks jurisdiction to have entered the *Ex Parte* Order;

c) Movant cannot comply with the *Ex Parte* Order, even if it were valid;

d) the Crittenden County Prosecuting Attorney is estopped from denying the existence of its agreement to transfer the Money to Little Rock and federal prosecution of the forfeiture action;

e) the *Ex Parte* Order is unconstitutional; and,

f) the *Ex Parte* Order is moot.

g) the Court lacks jurisdiction over the *res*, the subject matter, and the necessary parties in interest.

22. Movant requests an emergency hearing at the Court's earliest possible convenience.

THEREFORE, Movant respectfully requests that this action be dismissed pursuant to Ark. R. Civ. P. 12(1), (2), (4), (6), (7), and (8), or, alternatively, at least that the Order signed March 17, 1998, and entered March 18, 1998, be set aside, vacated, and held for naught.

Respectfully submitted,
/S/ Robert L. Wilson, Chief Counsel

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Brief In Support Of
Motion To Dismiss And, Alternatively,
Amended Motion To Vacate Order
(Filed March 27, 1998) (R. 53-61)

In chronological order, the relevant facts are as follows. The seizure was made on Saturday, March 7, 1998, solely by the Arkansas Highway Police ("AHP"), a state-wide law enforcement agency. The seizure was made during inspection of an interstate motor carrier engaged in interstate commerce, an inspection authorized by both Federal and State law. The Drug Enforcement Administration ("DEA") was contacted

immediately and the seizure was adopted by the DEA on March 7, 1998, and the Money was secured. At this point, the Money was still located in Crittenden County. On Monday, March 9, 1998, the first Notice of Seizure was filed in this matter in the Crittenden County Circuit Court, but no Complaint was filed. At the request of agents and employees of the AHP, James C. Hale, Jr., Deputy Prosecuting Attorney, then agreed that the Money should and could be transported to Little Rock by the AHP so that physical custody could be transferred to the DEA and federal forfeiture proceedings could commence. The agreement, even though not required, was expressed more than once and to multiple representatives of the AHP. On the evening of March 9, 1998, the Money, with the knowledge and acquiescence of the Deputy Prosecutor, was transported to Little Rock, where it was turned over to the DEA. The Money was then transferred into the custody of the United States Marshall. On March 16, 1998, the formal paperwork for the DEA administrative proceedings was begun. On March 18, 1998, at about 5:05 p.m., after the close of the business day, without any prior notice or knowledge, and, most importantly, well after the Money had been placed in Federal custody and federal forfeiture proceedings had begun, the AHP received a faxed copy of the *Ex Parte* Order directing it to transfer the Money to the Crittenden County Prosecutor's asset forfeiture account. The Order did not name any individual official of the AHP or direct any individual to take any action, but was only directed to the AHP as an entity. On March 20, 1998, the AHP filed its Motion to Vacate and the Crittenden County Prosecutor finally filed a Complaint. With the exception of the Order, which was received only after it had been signed and entered, neither AHP nor its attorneys have ever received any notice (including formal, informal, written, or oral via telephone) or copies of any pleading filed in this matter despite the fact that the Deputy Prosecutor has had full notice since March 7, 1998, that AHP is an interested party.

A federal agency's adoption of a seizure has the same effect *as if the federal agency had originally seized the property on the date it was seized by the local authorities. Madewell v. Downs*, 68 F.3d 1030 (8th Cir.) (citing The Caledonian, 17 U.S. 100, 103, 4 Wheat. 100, 4 L. Ed. 523 (1819); One Ford Coupe, 272 U.S. at 321, 47 S. Ct. at 155, 71 L. Ed. 279 (1926); *United States v. $119,000 in U.S. Currency*, 793 F. Supp. 246, 249 (D. Hawaii 1992) (calling this the "'adoptive forfeiture' doctrine"); *United States v. Certain Real Property Known as Lot B, Governor's Rd., Milton, N.H.*, 755 F. Supp. 487, 490 (D.N.H. 1990); *United States v. Alston*, 717 F. Supp. 378, 380 (M.D.N.C. 1989) (calling this the "adoption principle"), *aff'd sub nom., United States v. Winston-Salem/Forsyth County Bd. of Educ.*, 902 F.2d 267 (4th Cir. 1990)). In fact, the United States may adopt a seizure even when the person who seized the property had no authority to seize the property, or the initial seizure was constitutionally tainted. *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 325, 47 S. Ct. 154, 155, 71 L. Ed. 279 (1926); *United States v. Winston-Salem/Forsyth County Bd. of Educ.*, 902 F.2d 267, 272 (4th Cir. 1990); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 450 (9th Cir. 1983); *United States v. One 1956 Ford Tudor Sedan*, 253 F.2d 725, 727 (4th Cir. 1958). In other words, the federal adoption relates back to the time of the seizure, which means federal jurisdiction was acquired here before even the Notice of Seizure was filed in the Circuit Court. This is also consistent with the fact that 21 U.S.C. § 881 provides that the United States became the owner of the property at the time the unlawful act giving rise to the seizure occurred.

While there is a split of authority over whether a transfer of seized property to federal control *after proper state court proceedings have been initiated* divests the state court of jurisdiction, that is not at issue here because the transfer was made *before* the Complaint was filed in this action on March 20, 1998. Mere seizure pursuant to a State warrant, does not

establish exclusive state jurisdiction. *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995). Furthermore, the Deputy Prosecutor agreed to the transfer of the Money and the federal adoption. There is absolutely no way that the transfer could be characterized as improper. Like in *United States v. $12,290*, 956 F.2d 801 (8th Cir. 1992), the federal adoption, the transfer of the Money, and the initiation of the federal administrative proceedings disposes of this case. This is not a case of the federal government affronting the jurisdiction of the State. Instead, this is a case of a local official acting under the color of State authority in affront to the jurisdiction of the United States. It is the proceedings herein that are improper, not the adoption by the United States. It should be pointed out that Arkansas law provides discretion for the seizing agency to remove and hold seized property. Ark. Code Ann. § 5-64-505(d) expressly provides that the property is "deemed to be in the custody of the director *or seizing law enforcement agency*" (emphasis added) and that the agency "[r]emove the property to a place designated by it." Ark. Code Ann. § 5-64-505(j)

Furthermore, although there is admittedly some authority to the contrary, many cases have held that the federal law preempts the state law, regardless of which court first acquired jurisdiction. Considering that (1) the seizure occurred during inspection of commercial motor vehicles in interstate commerce, (2) the DEA was informed and adopted the seizure before the Prosecuting Attorney was contacted, (3) it is apparent that any investigation surrounding the source of the money will need to take place in Texas and other states, (4) the Money contained some counterfeit bills, (5) AHP determined as the seizing agency that federal proceedings are preferable, (6) the Money has never been in the custody or control of the Prosecuting Attorney, the Prosecuting Attorney agreed and acquiesced to the removal of the Money from Crittenden County, (7) the Prosecuting Attorney agreed to the institution of federal forfeiture proceedings, and (8) AHP, as a state agency

with discretion to request federal authorities to adopt its seizures, believed that federal authorities were better able to handle the resulting investigation and forfeiture proceedings and elected to request adoption of the seizure, 21 U.S.C. § 881 preempts Ark. Code Ann. § 5-64-505 under the Supremacy Clause of the United States Constitution. In light of the relation back doctrine, the property interest of the United States, and the fact that the United States possesses and controls the Money, there is no reason or justification for this Court to assert jurisdiction. See, e.g., Certain Real Property Known as Lot B, 755 F. Supp. at 490 (holding federal adoption of seizure meant federal jurisdiction over forfeiture attached first, and state court orders purporting to direct return of the property to the claimant could be enjoined by the federal court); Alston, 717 F. Supp. at 380 (describing the result of the adoption principle as making the federal government the winner of the "unseemly race to the res," but holding that the state court was without jurisdiction to issue orders concerning disposition of the property seized even though the federal adoption occurred after the state court assumed jurisdiction). However, the effect given the doctrine by the Supreme Court in One Ford Coupe, 272 U.S. at 325, 47 S. Ct. at 155, 71 L. Ed. at 279, was to establish that the seizure would be treated as if it had been made by an official with authority to make such a seizure, i.e., a federal official, rather than by someone with no authority to make the seizure.

The transfer of the Money was lawful, appropriate, and above-board. The only unseemly and inappropriate actions taken here have been taken by the Deputy Prosecutor. AHP fully advised the Deputy Prosecutor of the federal adoption and the preference for federal forfeiture proceedings between March 7 and March 9. The Deputy Prosecutor even agreed. Since then, there have proceedings, motion, orders, and other actions taken without any notice to AHP by the Deputy Prosecutor. The federal authorities acted at the request of the State of Arkansas, through AHP, the seizing agency. In no way could

the actions of the AHP and DEA be truthfully characterized as being improper in any way. It should be pointed out that neither AHP nor the DEA have even been made parties to these proceedings. There may be occasions where an untimely federal adoption could be construed as an affront to the state's sovereignty, but this is not one of them. Here, it is the local prosecutor affronting the United States' sovereignty against the express requests of the State agency that seized the Money. The Court has no more jurisdiction to order the release of the *res* than it does to order the release of a federal prisoner on a writ of habeas corpus.

Even if the first Notice of Seizure could be construed as having subjected the Money to the Court's jurisdiction, the voluntary removal of the Money from the Court's territorial and subject matter jurisdictions and into the DEA's hands deprived the Court of jurisdiction. Apparently, the Court was not advised of this development when it was presented with the unwritten, unnoticed, *ex parte* motion of the Deputy Prosecutor that requested the *Ex Parte* Order. Although an improper removal of the res, in an effort to defeat the court's jurisdiction does not deprive the court of jurisdiction over the res, the rule does not apply here because (1) the Court had not yet acquired exclusive jurisdiction over the res when it was removed and (2) the removal was entirely proper and voluntary on the part of AHP and the Deputy Prosecutor. A leading case on the issue is *Republic National Bank of Miami v. United States*, 506 U.S. 80 (1992), in which the Supreme Court held that simply removing the res from the territorial jurisdiction of the Court of Appeals did not defeat the appellate court's jurisdiction. However, in distinguishing one particular case, the court said:

> Fairly read, The Brig Ann simply restates the rule that the court must have actual or constructive control of the res when an in rem forfeiture suit is initiated. If the seizing party

> abandons the attachment prior to filing an action, it, in effect, has renounced its claim. The result is "to purge away all the prior rights acquired by the seizure," [citation omitted], and, unless a new seizure is made, the case may not commence.
>
> ....
>
> If the plaintiff abandons a seizure, a court will not proceed to adjudicate the case.

The Eighth Circuit made a similar ruling in *United States v. $12,390*, 956 F.2d 801 (8th 1992), but it is also distinguishable because the Deputy Prosecutor was fully aware of the transfer. Furthermore, the case makes clear that the warrants and notices filed in these proceedings do not provide the Court with jurisdiction over the Money. It was not until the Complaint was filed on March 20, 1998, that forfeiture proceedings were commenced. The removal of the Money occurred before the Court ever acquired jurisdiction and, in addition, was clearly voluntary and constituted an abandonment. The Court had no jurisdiction over the res when the *Ex Parte* Order was entered, a fact that is implicitly conceded by the fact that the Deputy Prosecutor finally filed a Complaint on March 20, 1998.

In addition, although the Order directs the AHP to return the Money, no individual person or official is named in the order and the Court lacks jurisdiction to issue a mandatory injunction against AHP. Ark. Const. art. 5, § 20.

The AHP cannot imagine any legitimate reason for the Deputy Prosecutor's interest in whether the forfeiture is procured through state or federal proceedings. Crittenden County has no drug task force to be funded from the proceeds.

In sum, the Court lacks jurisdiction over the *res*, the subject matter, and the "person" of AHP. Because of the lack of jurisdiction, the Court should dismiss this action in its entirety without prejudice to the Deputy Prosecutor's ability to refile in the event that the federal action were to prove unsuccessful. Alternatively, at the very least, the Court should vacate the Order entered March 18, 1998.

Respectfully submitted,
/S/ Robert L. Wilson, Chief Counsel

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Answer To Motion To Vacate
(Filed March 30, 1998) (R. 63-67)

Comes now the Plaintiff, State of Arkansas, by and through its court appointed attorney, James C. Hale, III, and for its Answer to the Movants Motion to Vacate, states and alleges:

1. That the Plaintiff admits that on March 18, 1998 that an Order signed on March 17, 1998 and entered on March 18, 1998 was faxed to the Chief of the Arkansas Highway Police and admits that copies of said Order was not provided to Movants counsel by Plaintiffs counsel prior to said Order being taxed. The Plaintiff denies the remaining allegations contained

in paragraph I of the Movants Motion to Vacate. The Plaintiff affirmatively states the Plaintiff has litigated and handled all Arkansas Highway Police forfeiture cases for the past five years and had never been advised by any representative of the Arkansas Highway Police that they ever had counsel and wanted notice of any forfeiture proceedings. The Plaintiff was not aware that the Movants had independent counsel relating to forfeiture matters. The Plaintiff further states that pursuant to A.C.A. 5-64-505, et. seq. it is not required to provide Movants counsel with any notice or pleadings in this matter.

2. That the Plaintiff admits that the Arkansas Highway Police did take possession of $3,166,199.00 on March 7, 1998 but denies that it was seized by the Arkansas Highway Police. The Plaintiff admits the remaining allegations contained in paragraph 2 of the Movants Motion to Vacate. The Plaintiff affirmatively states that the Crittenden County Prosecuting Attorneys office made the seizure pursuant to A.C.A. 5-64-505.

3. That the Plaintiff denies that the Movant is the seizing agency. The Plaintiff denies the remaining allegations contained in paragraph 3 of the Movants Motion to Vacate. The Plaintiff affirmatively states that the money is not the property of the United States and that the United States lacks jurisdiction in this cause because State In-Rem forfeiture proceedings were filed prior to any Federal administrative action and primary jurisdiction lies in Crittenden County, Arkansas.

4. That the Plaintiff admits the allegations contained in paragraph 4 of the Movants Motion to Vacate.

5. That the Plaintiff admits that the Motion was submitted by James C. Hale, III and that it was obtained without notice to Movant. The Plaintiff denies the remaining allegations contained in paragraph 5 of the Movants Motion to Vacate. The Plaintiff affirmatively states it is under no requirement to give

the Movants attorney notice and was not aware that the Arkansas Highway Police had independent counsel.

6. That the Plaintiff is without sufficient knowledge to admit or deny that the United States Drug Enforcement Agency ("DEA") administrative forfeiture proceedings have already begun and therefore denies same. The Plaintiff denies the remaining allegations contained in paragraph 6 of the Movants Motion to Vacate. The Plaintiff affirmatively states that any administrative forfeiture proceeding which was filed by the "DEA" lacks jurisdiction in this matter in that the Plaintiff had already begun a State seizure and this primary jurisdiction of the forfeiture. The only available means for the "DEA" to obtain jurisdiction was for said case to be transferred by Court order from the State Court's jurisdiction.

7. That the Plaintiff denies the allegations contained in paragraph 7 of the Movants Motion to Vacate. The Plaintiff affirmatively states that the Plaintiffs office has litigated and processed all forfeitures for the Arkansas Highway Police for the last five (5) years and the Movant has never showed any interest in any litigation or have taken part in any asset forfeiture before this time. The Movants statement that as a curtesy, the Crittenden County Prosecutors office was informed of the seizure, clearly evidence the true intent of the Movants attempt to circumvent the jurisdiction of the State Court.

8. That the Plaintiff is without sufficient knowledge to admit or deny if the money is in the possession or control of the Arkansas Highway Police. The Plaintiff specifically denies the remaining allegations contained in paragraph 8 of the Movants Motion to Vacate. The Plaintiff affirmatively states that neither the United States Marshalls office or the DEA has jurisdiction in this matter in that an In-Rem forfeiture proceeding was already pending in State court at the time the monies were turned over to the "DEA".

9. That the Plaintiff is without sufficient knowledge to admit or deny the allegations contained in paragraph 9 of the Movants Motion to Vacate and therefore denies same. The Plaintiff affirmatively states that any counterfeit currency can be segregated from the remaining currency and forwarded to the United States Secret Service for further investigation. However, this is not grounds to change the jurisdiction of the pending State forfeiture action to Federal Court.

10. That the Plaintiff denies the allegations contained in paragraph 10 of the Movants Motion to Vacate. The Plaintiff affirmatively states that at the time the Order was entered, it had no knowledge of any Federal forfeiture proceeding or that the Arkansas Highway Police had independent counsel. The Plaintiff was afforded no notice that the U.S. Currency was given to the Federal authorities until after it received a telephone call from the U.S. Marshalls office on March 20, 1998.

11. That the Plaintiff denies the allegations contained in paragraph 11 of the Movants Motion to Vacate. The Plaintiff affirmatively states that the United States nor their agents have jurisdiction over the for forfeiture of the U.S. Currency.

12. That the Plaintiff denies the allegations contained in paragraph 12 of the Movants Motion to Vacate.

13. That the Plaintiff denies the allegations contained in paragraph 13 of the Movants Motion to Vacate. The Plaintiff affirmatively states that paragraph 13 of the Movants Motion is merely an attempt by the Movant to circumvent State jurisdiction in this matter and is meritless.

14. That the Plaintiff denies the allegations contained in paragraph 14 of the Movants Motion to Vacate. The Plaintiff affirmatively states that the Movants are not entitled to notice of the seizure in this case. The Plaintiff further states that its

offices have litigated every asset forfeiture in Crittenden County, Arkansas for the Arkansas Highway Police for five (5) years and was not aware that the Movant even had counsel, them not showing any interest prior to this seizure. This the only time their alleged attorneys ever bothered to have any interest in any forfeiture seizure at all. The Movants should be estopped from now alleging that the Plaintiffs counsel is now all of a sudden in violation of ethical rules for cooperating with the local police which has been the procedure for years prior to the Movants counsel's motion.

15. That the Plaintiff denies the allegations contained in paragraph 15 of the Movants Motion to Vacate.

16. That the Plaintiff denies the allegations contained in paragraph 16 of the Movants Motion to Vacate.

17. That the Plaintiff denies the allegations contained in paragraph 17 of the Movants Motion to Vacate. The Plaintiff affirmatively states that any "DEA" administrative forfeiture proceedings lack Jurisdiction in this matter due to a prior pending State action regarding the same U.S. Currency. The State Court has primary jurisdiction of this forfeiture action.

18. That the Plaintiff denies the allegations contained in paragraph 18 of the Movants Motion to Vacate. The local Prosecuting Attorney's office and the Federal "DEA" have historically cooperated and worked together on asset forfeiture and what jurisdiction the forfeiture case is pending should not be a factor in determining jurisdiction of this case.

19. That the Plaintiff denies the allegations contained in paragraph 19 of the Movants Motion to Vacate.

20. That the Plaintiff denies that an emergency hearing is necessary in this matter.

WHEREFORE, the Plaintiff prays that the Movants Motion to Vacate be dismissed; for attorneys fees and for any and all other relief to which it may be entitled.

Respectfully Submitted,
/S/ James C. Hale, III, Attorney for Plaintiff

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Answer To Motion To Dismiss And Alternatively Amended Motion To Vacate Order
(Filed April 14, 1998) (R. 76-82)

Comes now the Plaintiff, State of Arkansas, by and through its court appointed attorney, James C. Hale, III, and for its Answer to the Movants Motion to Dismiss and Alternatively Amended Motion to Vacate Order, states and alleges:

1. That the Plaintiff admits that on March 18, 1998 that an Order signed on March 17, 1998 and entered on March 18, 1998 was taxed to the Chief of the Arkansas Highway Police and admits that copies of said Order was not provided to Movants counsel by Plaintiffs counsel prior to said Order being faxed. The Plaintiff denies the remaining allegations contained in paragraph I of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that the Plaintiff has litigated and

handled all Arkansas Highway Police forfeiture cases for the past five (5) years and had never been advised by any representative of the Arkansas Highway Police that they ever had counsel and wanted notice of any forfeiture proceedings. The Plaintiff was not aware that the Movants had independent counsel relating to forfeiture matters. The Plaintiff further states that pursuant to A.C.A. 5-64-505, et. seq. it is not required to provide Movants counsel with any notice or pleadings in this matter.

2. That the Plaintiff admits that the Arkansas Highway Police did take possession of $3,166,199.00 on March 7, 1998 but denies that it was seized by the Arkansas Highway Police. The Plaintiff admits the remaining allegations contained in paragraph 2 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that the Crittenden County Prosecuting Attorneys office made the seizure pursuant to A.C.A. 5-64-505.

3. That the Plaintiff denies that the Movant is the seizing agency. The Plaintiff denies the remaining allegations contained in paragraph 3 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that the money is not the property of the United States and that the United States lacks jurisdiction in this cause because State In-Rem forfeiture proceedings were filed prior to any Federal administrative action and primary jurisdiction lies in Crittenden County, Arkansas.

4. That the Plaintiff admits the allegations contained in paragraph 4 of the Movants Amended Motion to Vacate.

5. That the Plaintiff admits that the Motion was submitted by James C. Hale, III and that it was obtained without notice to Movant, The Plaintiff denies the remaining allegations contained in paragraph 5 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states it is under no

requirement to give the Movants attorney notice and was not aware that the Arkansas Highway Police had independent counsel.

6. That the Plaintiff denies the allegations contained in paragraph 6 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that any administrative forfeiture proceeding which was filed by the "DEA" lacks jurisdiction in this matter in that the Plaintiff had already begun a forfeiture proceeding in State Court and primary jurisdiction of the forfeiture lies in the Circuit Court of Crittenden County, Arkansas. The only available means for the "DEA" to obtain jurisdiction was for said case to be transferred by Court order from the State Court's jurisdiction.

7. That the Plaintiff denies the allegations contained in paragraph 7 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that the Plaintiffs office has litigated and processed all forfeitures for the Arkansas Highway Police for the last five (5) years and the Movant has never showed any interest in any litigation or have taken part in any asset forfeiture before this time. The Movants statement that as a curtesy, the Crittenden County Prosecutors office was informed of the seizure, clearly evidence the true intent of the Movants attempt to circumvent the jurisdiction of the State Court.

8. That the Plaintiff is without sufficient knowledge to admit or deny if the money is in the possession or control of the Arkansas Highway Police and therefore denies same. The Plaintiff specifically denies the remaining allegations contained in paragraph 8 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that neither the United States Marshalls office or the DEA has jurisdiction in this matter in that an In-Rem forfeiture proceeding was already pending in State court at the time the monies were turned over to the "DEA".

9. That the Plaintiff is without sufficient knowledge to admit or deny the allegations contained in paragraph 9 of the Movants Amended Motion to Vacate and therefore denies same. The Plaintiff affirmatively states that any counterfeit currency can be segregated from the remaining currency and forwarded to the United States Secret Service for further investigation. However, this is not grounds to change the jurisdiction of the pending State forfeiture action to Federal Court.

10. That the Plaintiff denies the allegations contained in paragraph 10 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that at the time the Order was entered, it had no knowledge of any Federal forfeiture proceeding or that the Arkansas Highway Police had independent counsel. The Plaintiff was afforded no notice that the U.S. Currency was given to the Federal authorities until after it received a telephone call from the U.S. Marshalls office on March 20, 1998.

11. That the Plaintiff denies the allegations contained in paragraph 11 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that the United States nor their agents have jurisdiction over the for forfeiture of the U.S. Currency.

12. That the Plaintiff denies the allegations contained in paragraph 12 of the Movants Amended Motion to Vacate.

13. That the Plaintiff denies the allegations contained in paragraph 13 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that paragraph 13 of the Movants Motion is merely an attempt by the Movant to circumvent State jurisdiction in this matter and is meritless.

14. That the Plaintiff denies the allegations contained in paragraph 14 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that the Movants are not

entitled to notice of the seizure in this case. The Plaintiff further states that its offices have litigated every asset forfeiture in Crittenden County, Arkansas for the Arkansas Highway Police for five (5) years and was not aware that the Movant even had counsel, them not showing any interest prior to this seizure. This is the only time their alleged attorneys ever bothered to have any interest in any forfeiture seizure at all. The Movants should be estopped from now alleging that the Plaintiffs counsel is now all of a sudden in violation of ethical rules for cooperating with the local police which has been the procedure for years prior to the Movants counsel's motion.

15. That the Plaintiff denies the allegations contained in paragraph 15 of the Movants Amended Motion to Vacate.

16. That the Plaintiff denies the allegations contained in paragraph 16 of the Movants Amended Motion to Vacate.

17. That the Plaintiff denies the allegations contained in paragraph 17 of the Movants Amended Motion to Vacate.

18. That the Plaintiff denies the allegations contained in paragraph 18 of the Movants Amended Motion to Vacate. The Plaintiff affirmatively states that any "DEA" administrative forfeiture proceedings lack jurisdiction in this matter due to a prior pending State action regarding the same U. S. Currency. The State Court has primary jurisdiction of this forfeiture action.

19. That the Plaintiff is without sufficient knowledge to admit or deny where to U.S. Currency originated but admits that the U.S. Currency was located in Arkansas at the time of the seizure giving Arkansas jurisdiction over this matter. The Plaintiff denies the remaining allegations contained in paragraph 19 of the Movants Amended Motion to Vacate. The local Prosecuting Attorney's office and the Federal "DEA" have historically cooperated and worked together on asset forfeiture

and what jurisdiction the forfeiture case is pending should not be a factor in determining jurisdiction of this case. The Plaintiff affirmative states that there have been no federal civil charges filed, all criminal charges have been filed in the Circuit Court of Crittenden County, Arkansas

20. That the Plaintiff admits that no individual of the Arkansas Highway Police was named in said order but denies the remaining allegations contained in paragraph 20 of the Movants Amended Motion to Vacate.

21. That the Plaintiff denies the allegations contained in paragraph 21 of the Movants Amended Motion to Vacate.

22. That pursuant to the Court order in the April 1, 1998 hearing, the Plaintiff will supplement this Answer with a Brief.

23. That the Plaintiff states that a hearing has already been conducted in the matter and paragraph 22 of the Movants Amended Motion is moot.

24. That all allegations not admitted to herein are specifically denied.

25. That the Plaintiff reserves the right to amend its pleadings at a later date.

WHEREFORE, the Plaintiff prays that the Movants Motion to Dismiss and Alternatively Amended Motion to Vacate Order be dismissed; for attorneys fees and for any and all other relief to which it may be entitled.

Respectfully Submitted,
James C. Hale, III, Attorney for the Plaintiff

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Brief In Response To The Movants
Motion To Dismiss And
Alternatively Motion To Vacate Order
(Filed April 14, 1998) (R. 83-106)

FACTS

On March 7, 1998, the Arkansas Highway Police (hereinafter referred to as AHP) stopped a vehicle at the weight scales being driven by Roberto V. Zamarripa (hereinafter referred to as Claimant) for certain traffic violations. A subsequent search of the Claimant vehicle was conducted incident to the arrest in which a Consent to Search was signed by the driver. (See exhibit "A" attached hereto). A search of the vehicle was conducted and approximately four (4) suitcases containing $3,166,199.00 in U.S. Currency (hereinafter referred to as U.S. Currency) was discovered. The AHP did take possession of the U.S. Currency and move said money out of Claimants vehicle and place it inside the weight scale office. At approximately 9:30 or 10:00 p.m., the AHP contacted James C. Hale, Jr., the Deputy Prosecuting Attorney for Crittenden County, Arkansas (hereinafter referred to as Prosecuting Attorney), at his home and requested that he come to the weight scales because a large amount of U.S. Currency had been found.

Subsequently, James C. Hale, III, the attorney which litigates all asset forfeiture cases in Crittenden County, was contacted by James c. Hale, Jr. and requested to come to the scene and assist the Prosecuting Attorneys office in the seizure of the U.S. Currency.

When the Prosecuting Attorney arrived at the weight scales, the U.S. Currency was located in four (4) suitcases in the comer of the weight scales office. The Prosecuting Attorney instructed the AHP personnel how to secure the money, seal it for evidentiary purposes and establish a chain of custody of the money for trial purposes. The money was in large suitcases and at the Prosecuting Attorneys instruction, the suitcases and money were wrapped, properly sealed and tagged as evidence. The Claimant was charged with felony charges under the Arkansas State Money Laundering statutes and a bond was set by the Honorable David Burnett. Both of the aforementioned actions were done by the Prosecuting Attorney at approximately 11:15 p.m. while at the scene. The Prosecutor then contacted Citizens Bank located in Marion, Crittenden County, Arkansas and arranged to have the bank opened at 11:30 p.m. (that night) in order that the U.S. Currency could be properly secured in the bank vault. The Prosecuting Attorney also instructed the AHP in how to transport the money to the bank in order that a chain of custody could be established. At the request of the Prosecuting Attorneys office arrangements with Citizens Bank were made to provide personnel on Sunday, March 8, 1998 to count the seized money. The AHP personnel were instructed by the Prosecuting Attorney on how to count the money in order to take samples of controlled substances from said currency as it was being counted. The Prosecuting Attorneys office did instruct the Arkansas Highway Police Department on how to transport the monies from the weight scale to Citizens Bank in order to maintain a chain of custody for evidentiary purposes.

A total of eight (8) subject samples were taken while the money was being counted. (See exhibit "B" attached hereto). On March 9, 1998, at the Prosecuting Attorneys instruction, the eight (8) subject samples were delivered to the Arkansas State Crime Lab. James C. Hale, Jr., using his influence as a long time prosecutor, had, the subject samples tested immediately in order to proceed with the forfeiture proceedings. (It should be noted that there usually is a four to six month waiting list to have drug samples tested at the State Crime Lab). After the money was counted on March 8, 1998, the Prosecuting Attorney instructed the AHP to transport the money on March 9, 1998 to the Arkansas State Crime Lab located in Little Rock, Arkansas for a chemical analysis to be conducted on said money. On March 9, 1998, at 9:30 a.m. the Prosecutors office filed a Civil In-Rem forfeiture action in Case No. CIV-98-226 in the Circuit Court of Crittenden County, Arkansas and served the Claimant at 10:30 a.m. (See exhibit "C" attached hereto). At the time the forfeiture action was filed and served on the Claimant, the U.S. Currency was still in the Prosecuting Attorneys possession secured in the vault at Citizens bank in Marion, Arkansas. Since the initial pleadings, there have been numerous pleadings filed in Case No. CIV-98-226 including a Summons, Complaint, Order for Return of Funds and Warning Orders issued by the Crittenden County Clerk which have been published in the Evening Times, a newspaper of local circulation.

On March 9, 1998, sometime in the evening, the AHP did take possession of the U.S. Currency from Citizens Bank and transport said U.S. Currency to Little Rock, Arkansas. On March 20, 1998, the U.S. Currency was deposited into the Federal Marshall's Trust Fund Account in Little Rock, Arkansas. The Crittenden County Prosecuting Attorneys office was not notified of said deposit nor that the money had not been taken to the Arkansas State Crime Lab for a chemical analysis. The first notice the Crittenden County Prosecutors office had that

said funds were not at the State Crime Lab was on March 20, 1998 when it received a telephone call from the United States Federal Marshalls office stating they would not comply with this Courts March 18, 1998 Order to Return funds.

The underlying misdemeanor charges were filed and tried by the Crittenden County Prosecuting Attorneys office in the Municipal Court of Crittenden County, Arkansas on March 9, 1998. (See exhibit "D" attached hereto). The -Prosecuting Attorneys office filed felony criminal charges in this matter, and assisted the AHP in filling out an Affidavit to obtain search warrants for the search of the vehicle transporting the U.S. Currency. (See exhibit "E" attached hereto). The Crittenden County Prosecuting Attorneys office has also processed the seizure of the motor vehicle transporting the U.S. Currency and cargo. (See exhibit "F" attached hereto).

On March 20, 1998, the Arkansas Highway Police filed a Motion to Vacate Order and dismiss case in Crittenden County Circuit Case Number CIV-98-226. A hearing was held on said Motion on April 1, 1998 whereby the Judge took the matter under advisement in order for the parties to file briefs.

I. THE ARKANSAS HIGHWAY POLICE HAS NO AUTHORITY TO OBJECT TO OR TO MOVE TO DISMISS THE CRITTENDEN COUNTY PROSECUTING ATTORNEY'S CIVIL FORFEITURE ACTION

The Movant in this case, the AHP, is a law enforcement division of the State of Arkansas. The AHP claims that they are a party in interest and have filed a Motion to Dismiss the Crittenden County Prosecuting Attorney's In-Rem civil forfeiture action. However, the AHP has no authority to object to the State forfeiture action and have consistently failed to cite

any authority that authorizes them to dismiss or object to this lawsuit. The Movants have failed to cite any authority in any of their pleadings or at the April 1, 1998 hearing. The AHP have also allege that they control what Jurisdiction, (State or Federal), this civil forfeiture action will be filed. The AHP has no authority to make this decision that being a decision made by the Prosecuting attorney of the District in which the Res is seized.

The only authority cited by the AHP in support of their allegations, were several subsections of Arkansas Code Annotated 5-64-505(d) and 5-64-505(j). However, when the statute is reviewed in its entirety, it is clear that the sections cited by the AHP deal with securing property after said property is seized. Neither 5-64-505(d) nor 5-64-505(j) authorize the police agency to determine what jurisdiction a civil forfeiture action shall be filed in. The subsections cited do not support the AHP's theory whatsoever.

The Arkansas forfeiture statutes are interpreted narrowly. *Beebee v. State*, 298 Ark. 119, 765 S.W.2d 943 (1989). Even a broad view of the statutes cited by the Movants do not support their theory. If the Arkansas State legislature had intended for the police to have authority to decide what jurisdiction (State or Federal) civil forfeiture actions would be filed in, they would have set out this authority in the statute. It is the Plaintiffs position that the legislatures intent was clear in who it intended would decide what jurisdiction forfeiture actions would be filed and that is the Prosecuting Attorney of the Judicial district in which the seizure was made. The Prosecuting Attorney's office has always made these decisions and is the only law enforcement agency mentioned in the statutes having authority to file forfeiture actions forfeiting property. See A.C.A. 5-64-505(b). Arkansas Code Annotated 5-64-505 allows for only one (1) means by which property is to be seized and forfeited and that is by a Petition filed by the Prosecuting Attorney of the Judicial

Circuit. (emphasis added). 5-64-505(b) sets out the authority by which property may be seized and forfeited.

II. THE ARKANSAS HIGHWAY POLICE ARE NOT A PROPER PARTIES TO THIS LAWSUIT NOR IS IT PROPERLY BEFORE THE COURT

The AHP claim to be an interested party and have a filed a Motion to Dismiss the States forfeiture proceedings. However, to be properly before the Court, the AHP must first establish that they have an interest in the forfeiture proceedings that is not protected by the parties already involved. Rule 24 of the Arkansas Rules of Civil Procedure sets out the proper procedure for interested parties to intervene in cases where they feel that their interests are not adequately protected. Rule 24 of the Arkansas Rules of Civil Procedure states in pertinent part:

> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confirms an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."
>
> "(c) PROCEDURE. A person desiring to intervene shall serve a motion to. intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting

> forth the claim or defense for which intervention is sought. When the constitutionality of the statute of this State affecting the public interest is drawn into question in any action the court may require that the Attorney General of the State be notified of such question."

Not only has the AHP failed to follow the proper procedures for intervention, they are not entitled to intervene as a matter of law. An applicant for intervention must establish not only a sufficient interest, but also that the disposition of the action may, as a practical matter, impair or impede an ability to protect one's interest and that the interest is not adequately represented by the existing parties. *UH of Ark., Inc. v. City of Sherwood*, 296 Ark. 97, 752 S.W. 2d 36 (1988). In the present case, the only interest the AHP have in intervening in this cause of action is that they wish to circumvent the statutory disbursement procedure for forfeited funds set out by the State legislature in A.C.A. 5-61-505 et. seq. In short, the only reason the AHP's counsel has made an appearance in this matter is that they want to fatten their budget which will cost the citizens of the State of Arkansas $600,000-00. This is not a proper interest or reason to intervene in the State forfeiture action. Furthermore, not only does the Prosecuting Attorneys office handling this forfeiture action not impede or impair the AHP's ability to protect its interest, the Crittenden County Prosecuting Attorneys office is at this time better representing the State of Arkansas than the Movants attorneys and any allegations that the States interest is not being adequately represented by the Prosecuting Attorneys office is unfounded. The Movants have failed to follow the proper procedures to intervene in this cause of action and are not entitled to intervene as a matter of law. The AHP is not a proper party to this lawsuit nor is it properly before this court. Their Motion to Dismiss the Plaintiffs forfeiture action should be dismissed with prejudice.

III. THE CRITTENDEN COUNTY PROSECUTING ATTORNEYS OFFICE WAS THE SEIZING LAW ENFORCEMENT AGENCY

Even if the Court does decide that the seizing law enforcement agency has authority to decide in which jurisdiction (State or Federal) a forfeiture action shall be filed the AHP was not the seizing law enforcement agency in this case. Although the AHP did initially take possession of the monies, the facts clearly show that the Crittenden County Prosecuting Attorneys office was actually the seizing law enforcement agency. On March 7, 1998, the AHP did take possession of the money and move said money out of the Claimants vehicle and place it inside the weight scales office. However, from that point forward the Prosecuting Attorneys office (at the Arkansas Highway Police's request), took over and processed the seizure of the money.

A brief review of the facts clearly support the Plaintiffs position. At approximately 9:30 p.m., the AHP contacted James C. Hale, Jr., Deputy Prosecuting Attorney for Crittenden County, at his home -and requested he come to the weight scales because the AHP had found a large amount of U.S. Currency in a vehicle. At the time of Mr. Hale's arrival the money was not secured, packed in suitcases and laying in the comer of the weight scale office. The Prosecuting Attorney and James C. Hale, III instructed the AHP personnel how to secure the money, seal it for evidentiary purposes and establish a chain of custody of the money for trial purposes. The money was in large suitcases and at the Prosecuting Attorneys instruction, the suitcases and the money were wrapped, properly sealed and tagged as evidence. The Defendant, Roberto V. Zamarripa, was charged with felony charges under the Arkansas State Money Laundering statutes and a bond was set by the Honorable David Burnett. Both of the aforementioned actions were done by the

Prosecuting Attorney at approximately II: 15 p.m. on March 7, 199 8 at the scene.

The Prosecutor then contacted Citizens Bank located in Marion, Arkansas, and arranged to have the bank opened at 11:30 p.m. (that night),in order that the monies could be properly secured in the bank vault. The Prosecuting Attorney also instructed the AHP how to transport the monies to the bank in order that a chain of custody could be established. At the request of the Prosecuting Attorneys office, arrangements with Citizens Bank were made for the bank to provide personnel on Sunday, March 8, 1998 to count the seized money. The AHP personnel were instructed by the Prosecuting Attorney how to count the money in order to take subject samples of controlled substances from said currency as it was being counted. A total of eight subject samples were taken while the money was being counted. (See exhibit "B" attached hereto). Subsequently on March 9, 1998, at the Prosecuting Attorneys instructions, the eight subject samples were hand delivered to the Arkansas State Crime Lab. James C. Hale, Jr., using his influence as a long time prosecutor, had the subject samples tested immediately in order to proceed with the State forfeiture proceedings. (It should be noted that there usually is a four to six month backlog for chemical analysis tests).

After the money was counted on March 8, 1998, the Prosecuting Attorney instructed the AHP to transport the money on March 9, 1998 to the Arkansas State Crime Lab located in Little. Rock, Arkansas for a chemical analysis to be conducted on said money. The above mentioned instructions by the Prosecuting Attorney as to where the money was to be transported and for what purpose was corroborated by the testimony of Jeff Jenkins, a representative from Citizens Bank.' Jeff Jenkins testified at the April 1, 1998 hearing that it was his understanding based upon his conversations with the AHP personnel that assisted him in counting the money, that the

monies were to be taken to the Arkansas Crime Lab to have a chemical test conducted on the money.

On March 9, 1998, between 9:30 and 10:00 a.m., the Prosecuting Attorneys office filed a Civil In-Rem forfeiture action in Case No. CIV-98-226 in the Circuit Court of Crittenden County, Arkansas and served Roberto V., Zamarripa at 10:30 a.m. (See exhibit "C" attached hereto). At the time the forfeiture action was filed and served on the Claimant, the U. S. Currency was still in the Prosecuting Attorneys possession secured in the vault at Citizens Bank in Marion, Arkansas. Since the initial pleadings were filed, there have been numerous pleadings filed in Case No. CIV-98-226 including a Summons, Complaint, Orders for Return of funds and a Warning Order has been issued by the Crittenden County Circuit Clerk and published in the Evening Times. On March 20, 1998, the AHP against the specific instructions of the Prosecuting Attorneys office deposited the U.S. Currency in the United States Marshall's Trust Account.

To further support the States position that the Prosecuting Attorneys office is the seizing agency, it should be noted that the Prosecuting Attorneys office has filed the criminal charges in this matter, assisted the AHP in filling out Affidavits and obtain search warrants for the search of the vehicle transporting the U.S. Currency. The Prosecuting Attorneys office has also processed the seizure of the motor vehicle transporting the currency and the cargo. (See exhibit "F" attached hereto).

The Prosecuting Attorneys office was clearly the seizing agency and have maintained that they were the seizing agency throughout these proceedings. Merely taking the money out of the truck and placing it into the weight scale office does not equate to the AHP being the seizing law enforcement agency. The Crittenden County Prosecuting Attorneys office was the

seizing agency in this forfeiture action as it has been for every civil forfeiture action filed in Crittenden County by the Arkansas Highway Police for the past ten (10) years prior to this seizure. The bottom line is that up until the evening of March 9, 1998, the AHP only had minimal involvement in the seizure and there is no evidence that the Federal authorities had any involvement whatsoever.

IV. THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS HAS PRIMARY JURISDICTION OF THIS IN-REM FORFEITURE PROCEEDING TO THE EXCLUSION OF ANY FEDERAL ADMINISTRATIVE FORFEITURE PROCEDURE

It is well established law that only one Court may have jurisdiction over the Res in an In-Rem proceeding, and therefore the first Court to obtain In-Rem jurisdiction maintains it to the exclusion of all others, whether the Court be State or Federal. *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995); *United States v. $12,390.00*, 956 F.2d 801 (8th Cir. 1992); *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195, 55 S. Ct. 386, 389, 79 L. Ed. 850 (1935); *United States v. Certain Real Property 566 Hendickson Blvd.*, 986 F.2d 990 (6th Cir. 1993); *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 44 (1st Cir. 1991); *United Sates v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120 (7th Cir. 1991); *United States v. Winston-Salem County Bd. of Education*, 902 F.2d 267 (4th Cir. 1990); *United States v. $79,123.49*, 830 F.2d 94 (7th Cir. 1987); and *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142 (9th Cir. 1989). The above mentioned law is clearly the law applicable in the Eighth Circuit as well as all the other jurisdictions and has been consistently upheld by the United States Supreme Court.

The reasoning behind the above mentioned law was plainly stated in *United States v. One 1985 Cadillac Seville*, supra. The Court stated in One 1985 Cadillac:

> "A federal forfeiture action under 21 U.S.C. § 881 is an in rem action. *United States v. $5 7,480.05 United States currency and Other Coins*, 722 F.2d 1457, 1458 (9th Cir. 1984). A California statutory forfeiture action against defendant property under the Health and Safety Code likewise is in rem. *People v. One 1941 Chevrolet Coup*, 37 Cal. 2d 233, 231 P.2d 832, 834 (1951) (per curiam). The California proceeding commenced before the federal one. The last recorded order of the state court we have seen requires the money to be held by state authorities pending disposition. We know of no disposition.
>
> A common-law rule of long standing prohibits a court, whether state or federal, from assuming in rem jurisdiction over a res that is already under the in rem jurisdiction of another court. *Penn Gen. Casualty co. v. Pennsylvania*, 294 U.S. 189, 195, 55 S. Ct. 388, 389, 79 L. Ed. 850 (1985); *United States v. $79,123.49 in United States Cash and Currency*, 830 f 2d 94, 95 (7th Cir. 1987); *Knaefler v. Mack*, 680 F.2d 671, 675 (9th Cir. 1982) (dictum); *Butler v. Judge of United States Dist. Ct.*, 116 F.2d 101 8, 1015 (9th Cir. 1941); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 450 n. 5 (9th Cir. 1983), *cert. denied*, 464 U.S. 1071, 104 S. Ct. 981, 79 L. Ed. 2d 217 (1984). The purpose of the rule is the maintenance of comity between courts; such harmony is especially compromised by state and

federal judicial systems attempting to assert concurrent control over the res upon which jurisdiction of each depends. *See Penn General*, 294 U.S. at 195, 55 S. Ct. at 989.

> (2) The rule against concurrent in rem proceedings is not a constitutional limitation upon the jurisdiction of the federal courts. Rather, it is a prudential limitation applied by the Supreme Court in the interest of judicial harmony. this does not mean, however, that the matter is within the discretion of the district court. The language of *Penn General* indicates that a federal court must yield to a prior state proceeding. *Penn General*, 294 U.S. at 195, 55 S. Ct. at 989 {"[T]he jurisdiction of one court must of necessity yield to the other.")

The Seventh Circuit recently applied the rule against concurrent in rem jurisdiction of facts similar to ours. *$79,123.49*, 830 F.2d at 94. The court required a federal forfeiture proceeding under 21 U.S.C. § 881 to be dismissed because the district court had assumed jurisdiction over a res already the subject of a Wisconsin forfeiture case. *Id.* at 99. we find the Seventh Circuit's application of the rule to per persuasive.

We decline to distinguish *$79,123.49* on the grounds suggested by the government: that while Wisconsin sought return of the res, and the federal order of summary judgment conflicted with the state disposition, here the state case is apparently inactive, and California does not seek the res. *See id*, at 95-96. Admittedly, if there is no conflict between judicial systems, the evils the rule is designed to avoid do not arise, and

we have less reason to apply it. We have no facts before us to indicate that the state court relinquished jurisdiction, however.

(3) Whether California authorities approved the DEA seizure is irrelevant. The rule is intended to promote comity between *courts*, not executives. *See Penn General*, 294 U.S. at 195, 55 S. Ct. at 989. We have found no authority indicating that a failure on the part of the state court to protest the federal proceeding, or by the state to prosecute, allows the district court to assume jurisdiction. Rather, some affirmative act of abandonment is required. *See One 1977 Mercedes*, 708 F.2d at 450 n. 5; C. Wright; A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d §* 3631 (1985). In cases in which there is in fact no dispute between state and federal courts, such affirmative proof should not be hard to obtain.

(4) In addition we reject, as did the Seventh Circuit, the argument that the fat of federal possession of the res takes jurisdiction from the state court and bestows it upon the district court. *See $79,123.49*, 830 F.2d at 98. Although we are familiar with the maxim, "possession is nine-tenths of the law," we prefer to apply the remaining one-tenth and decline to "substitute a rule of force for the principle of mutual respect embodied in the prior exclusive jurisdiction doctrine." Id. The district court must decline federal jurisdiction over money taken from

> the state court's jurisdiction in such a manner.

See also *United States v. One 1979 Chevrolet C-20 Van*, supra.

The law is clear that a State court in which In-Rem jurisdiction has already vested has jurisdiction over the forfeiture proceedings exclusive of all other Courts including Federal Court.

In the present case, it is clear that the Circuit Court of Crittenden County, Arkansas had In-Rem jurisdiction over the money in question on March 9, 1998. On March 9, 1998 the Crittenden County Prosecuting Attorneys office filed in Case No. CIV-98-226 a Civil In-Rem forfeiture action for the forfeiture of the money. This forfeiture action was filed and a Notice was served on the only known Claimant, Roberto V. Zamarripa, at 10:30 a.m. The U.S. Currency was in the possession of the Crittenden County Prosecuting Attorneys office at Citizens Bank at the time Case No. CIV-98-226 was filed and served. Having possession of the Res at the time the State In-Rem proceeding was filed gives this Court In-Rem jurisdiction over the Res. The Circuit Court of Crittenden County was the first court to obtain In-Rem jurisdiction of the U.S. Currency and has jurisdiction over said money. There has been no evidence presented to the Court by the Movant that a Federal Administrative proceeding has been initiated. There has been no documents or testimony presented to the Court by any representative of any Federal agency that any type of Federal forfeiture proceedings have been initiated. The DEA and District Attorneys office were both given notice of the April 1, 1998 hearing date but failed to appear.

The only evidence before the Court that there has been an In-Rem forfeiture proceeding commenced for jurisdictional

purposes was presented by the Crittenden County Prosecuting Attorneys office. The Movants failed to meet their burden of proof that the Court lacks jurisdiction and their Motion should be dismissed.

The AHP in their Motion to Dismiss, Brief and in their argument at the April 1, 1998 hearing, claim that this Court does not have Jurisdiction of the Res, claiming, among, other things: (1) That because the DEA adopted the forfeiture, the money is now the property of the United States; (2) That because a Complaint for the State forfeiture had not been filed before March 20, 1998 when the AHP (without authority from the Prosecuting Attorneys office) turned the money over to the DEA, this Court never obtained In-Rem jurisdiction over the Res; (3) That because the money was deposited into the Federal Marshall's Trust Account, the State Court no longer has jurisdiction over the Res; (4) That because-this Court nor the Prosecuting Attorneys office has present possession of the U.S. Currency, the State Court has no jurisdiction over the Res; and (5) That the Crittenden County Prosecuting Attorneys office abandoned the money, consented to the forfeiture proceedings and consented to Federal jurisdiction. It is the Plaintiffs position that none of the above mentioned arguments have merit, are not supported by the case law cited by the Movants nor by the facts.

The majority of the above mentioned issues were specifically addresses by the United States Supreme Court in *Republic National Bank of Miami v. United States*, 506 U.S. 80 (1992). The facts and issues in Miami are similar and directly applicable to the issues in the present proceedings. The issue in the Miami case was whether the Court of Appeals continued to have jurisdiction in an In-Rem forfeiture proceeding after the Res, then in the form of cash, was removed by the United States Marshall from the judicial district and deposited into the U.S. Treasury. The United States Supreme Court in Miami

specifically addressed the issue of whether continued control of the Res is required for a Court to maintain jurisdiction. The Court in unequivocal terms rejected the United States argument that there has to be continued control of the Res in order for a Court to maintain In-Rem jurisdiction. The Court in pertinent part held:

> "the "settled" rule on which the government relies-that jurisdiction over a proceeding depends upon continued control of the Res-does not exist. Rather, the applicable general principal is that jurisdiction, once vested, is not divested by a discontinuance of possession"

The U.S. Supreme Court also addressed the issue as to what exactly is required for In Rem jurisdiction to vest. The Court cited Brig Ann, 13 U.S. 289, 290 3 L. Ed. 794 (1815) the Court quoted Brig Ann as follows:

> "Fairly read, the Brig Ann simply restates the rule that the Court must have actual or constructive control of the Res when an In Rem forfeiture suit is initiated. If the seizing party abandons the attachment prior to filing an action, it, in effect, has renounced its claim."

In the present case, the Crittenden County Circuit Court had actual control over the Res when suit was filed. The U.S. Currency was in the control of the Prosecuting Attorney on March 9, 2998 secured in the vault at Citizens Bank located in Marion, Crittenden County, Arkansas.

The Court in Miami went further to state that to initiate an In-Rem forfeiture suit all that was required was that the property be subject to the control of the Court and notice given

to the world. The Court in Miami citing *Miller v. United States*, 11 Wall 268, 294-295, 20 L. Ed. 135 (1870) stated:

> ("confessedly the object of the writ was to bring the property under the control of the court and keep it there, as well as to give notice to the world. These objects would have been fully accomplished if its direction would have been nothing more than to hold the property subject to the order of the court, and to give notice.") neither interest depends absolutely upon the continuous presence of the Res in the District.

The Supreme Court in citing this caption from Miller is holding that a minimum is all that is necessary for a Court to obtain In-Rem jurisdiction; (1) making the property subject to the order of the court; (2) to give notice. Both of these prerequisites were satisfied when the State forfeiture action was filed on March 9, 1998. The facts and law support the Plaintiffs argument that In-Rem jurisdiction is vested with the Crittenden County Circuit Court.

In support of their position that the State Court does not have jurisdiction of the money, the AHP cites *United States v. $12,390*, 956 F.2d 801 (8th Cir. 1991). However, the opinion in *United States v. $12,390.00*, supra, is not applicable to the case at hand. The key issue that makes the holding in this case inapplicable is that the Courts decision that the State Court lacked jurisdiction hinged on the fact that there never was any State forfeiture proceeding commenced prior to the adoption of the Federal forfeiture. This is a pivotal point in regard to this case in that there was a State forfeiture action commenced by the Crittenden County Prosecuting Attorneys office on March 9, 1998 prior to any federal forfeiture. The Court in *United States v. $12,390.00* in pertinent part states:

> "The claimants argue that the District Court should have dismissed this action because the Missouri state court had already acquired jurisdiction over the money in question. The police executed a search warrant issued by the Circuit Court for the City of St. Louis, and they then filed a return with that same court listing the currency as having been seized. Thus, claimants say, the state court acquired exclusive jurisdiction. Only one court at a time can have jurisdiction over a particular res. The government responds that local authorities voluntarily delivered the money to Agent Walton, and that he then initiated federal forfeiture proceedings before any action had been taken by the state court. Indeed, no state forfeiture proceeding was ever commenced."

The AHP also cited *Madewell v. Downs*, supra; *United States v. Winston-Salem*, supra; *United States v. 1977 Mercedes Benz*, supra; and *United States v. One 1956 Ford Tudor Sedan*, supra, but each and every one of these cases the Federal Courts obtained jurisdiction over the Res because there had been no State forfeiture proceedings commenced. That is not the case here and these cases simply are not applicable to the case at bar.

The AHP further argued that the Crittenden County Prosecuting Attorneys office voluntarily abandoned the Res in order for the case to be pursued through Federal forfeiture procedures. However, the testimony of the James C. Hale, Jr., the Prosecuting Attorney who communicated with the AHP regarding this case clearly contradicted this. Mr. Hale's testimony that Brent Davis would have to be contacted prior to any decision to transfer the case to the DEA was corroborated by the testimony of Captain Danny McClain of the AHP.

Captain McClain testified that Mr. Hale told him that he would have to check with Brent Davis, the Prosecutor of the 2nd Judicial District, prior to making any decision concerning transferring the State forfeiture case to the Federal authorities. Mr. Hale's testimony was further indirectly corroborated by Bill Wharton who testified that when he spoke to Mr. Hale, he got the impression there may be some problems with transferring the case. The Crittenden County Prosecuting Attorneys office has vigorously held the position that it was proceeding with the State forfeiture action and has filed numerous pleadings in pursuit of the forfeiture of the U.S. Currency. There was no act of abandonment on the part of the Crittenden County Prosecuting Attorneys and this is clearly reflected by the record in Case No. CIV-98-226.

V. THE ADOPTIVE FORFEITURE DOCTRINE IS NOT APPLICABLE IN THIS CASE AND DOES NOT DEPRIVE THE COURT OF IN-REM JURISDICTION OF THE FORFEITURE

The AHP relies almost exclusively on the adoptive forfeiture doctrine in their attempt to establish jurisdiction of this forfeiture with the DEA. The Movant is attempting to thwart this Courts jurisdiction by using the adoptive forfeiture doctrine to leap frog from March 20, 1998, the day the money was deposited in the Federal Marshall's Trust account back to March 7, 1998, the day the plaintiff seized the U.S. Currency. However, the adoptive forfeiture doctrine is not applicable in this case and not applicable when the State Court has established primary In-Rem jurisdiction.

The Movant cites *Madewell v. Downs*, supra, and *U.S. v. $12,290.00*, supra, two Eighth Circuit Court cases to support its theory. However, neither of these case are applicable to the case at hand. The pivotal issue that allowed Federal jurisdiction

over State Jurisdiction in both cases was that at the time the Federal administrative forfeiture action was commenced there had been no State Civil forfeiture action commenced and the seizure of the U.S. Currency was based on a criminal warrant. The rulings in *U.S. v. Winston Salem*, supra, *U.S. v. 1977 Mercedes Benz*, supra, and *U.S. v. $12,290.00*, supra, are inapplicable for the same reason. As mentioned earlier, in the present case there was a State forfeiture action already pending before the DEA even acquired possession of the U.S. Currency. The Madewell opinion is the leading case cited by the Movant and all the Movants cases cited in his Brief are contained in this opinion. In Madewell , the Court explicitly supports the plaintiffs position that the Circuit Court of Crittenden County, Arkansas has primary jurisdiction over this case because it first established In-Rem jurisdiction over the Res. The Court in Madewell held:

> "although this court would not suggest that a late federal adoption of a seizure and actual transfer of the property to federal control could or should be used to avoid -the effects of proper state court proceedings concerning the seized property after its seizure by state or local officials and before federal adoption, *See $12,390*, 956 F.2d at 805 (State court may have primary and exclusive jurisdiction over the res if it first established in rem jurisdiction over the res prior to institution of federal forfeiture proceedings."

The court in Madewell went further and held that the adoptive forfeiture doctrine was not applicable at least in the Eighth Circuit (Arkansas) to state court actions filed prior to the Federal adoption of the case. The Court in Keynote 9 stated in pertinent part:

> "this courts conclusion on the import of the "adoption principal" in state court actions prior to-the actual adoption must be contrasted with the effect given the principal by some district courts. *See e.g., Certain Real Property Known as Lot B,* 755 F. Supp. at 490 (holding federal adopting of seizure meant federal jurisdiction over forfeiture attached first, and state court orders purporting to direct return of the property to the claimant could be enjoined by the federal court); *Alston,* 717 F. Supp. at 380. (describing the result of the adoption principle as making the federal government the winner of the "unseemly race to the res," but holding that the state court was without jurisdiction to issue orders concerning disposition of the property seized even though the federal adoption occurred after the state court assumed jurisdiction."

The Court in Madewell made it clear that it did not apply the adoption principal as did the Courts in Certain Real Property Known as Lot B, supra, Alston, supra, specifically citing these two cases to contrast.

In other words, the Eighth Circuit Court in Madewell explicitly rejected the Federal adoption doctrine as applied in Certain Real Property Known as Lot B; supra and Alston, supra. In short, the adoptive forfeiture doctrine and/or the relation back doctrine does not deprive a State Court of In-Rem jurisdiction if the State Court bad jurisdiction prior to the institution of Federal forfeiture proceedings. In the present case, the facts clearly show that the relation back doctrine is inapplicable.

The Movants allege that the DEA had jurisdiction of the Res on March 7, 1998 attempting to apply the relation back doctrine as applied to Federal Administrative forfeitures.

However, in the interpretive notes and decisions following 19 U.S.C. § 1607 a Federal Administrative forfeiture is not instituted by merely forwarding papers. *Floyd v. United States*, 860 F.2d 999 (1988). In the present case, the contact, if any, with the DEA regarding this forfeiture did not even equate to forwarding papers. There was no Federal Administrative forfeiture initiated on March 7, 1998 or at the present date.

VI. THE ARKANSAS HIGHWAY POLICE'S ATTEMPT TO DISMISS THE STATE FORFEITURE ACTION IN AN ATTEMPT TO AVOID THE EFFECT OF PROPER STATE COURT PROCEEDINGS, AND AN AFFRONT TO STATE COURT JURISDICTION

The AHP has made no attempts to hide their underlying motive for attempting to dismiss the forfeiture action. Every witness that testified in the April 1, 1998 hearing on behalf of the AHP stated that they wanted the DEA to handle this forfeiture proceeding because the AHP would receive a larger portion of any disbursement proceeds if forfeited by the DEA. They also testified that they knew it would cost the State of Arkansas $600,000.00 in administrative fees for the DEA to handle the forfeiture. This is a blatant attempt to circumvent the disbursement procedure of forfeited funds set out by the Arkansas legislature in A.C.A. 5-64-505. The AHP's intentions are exactly what the Court in Madewell, supra, held that the Federal adoption doctrine could not be used for "to avoid the effects of proper State Court proceedings concerning the seized property after its seizure by the State." The AHP's actions and motive in attempting to dismiss this State forfeiture action should not be tolerated by this Court and is an affront to the State Court jurisdiction.

In *Scarabin v. Drug Enforcement Admin.*, 966 F.2d 989, 991 (5th Cir. 1992), the Fifth Circuit expressed a strong disapproval of adoptive seizures. The Court in Scarabin stated:

> "On November 16, 1990, the DEA gave the Sheriff s Office $11,124 (or 90% of $12,360) under a federal stature that allows the DEA to return forfeited property to state or local law enforcement agencies that have participated directly in he seizure or forfeiture of that property. Thus, with the assistance of the DEA, the Sheriff s Office was able (at least for the time being) to circumvent Louisiana law that would have required it to return Scarabin's $12,360. NFL sportscaster might call the handoff from the Sheriffs Office, a "flea-flicker" play. Scarabin calls the arrangement between the DEA and the Sheriffs Office a "scam," "shell game," and "money laundering," and refers to the return of $11,124 to the Sheriffs Office as an "illegal kickback." We really cannot quarrel with those appellations. The DEA, more prosaically, refers to it as an "equitable sharing arrangement" —admittedly a kinder, gentler euphemism, albeit one inappropriate here.

See also United States v. C-20 Van, supra.

> "Moreover, it troubles us deeply that a local police department can ignore statutory directives as a "routine and administrative" matter.
>
> "At the time the complaint was filed in federal district court, the state forfeiture action was pending and the state court had jurisdiction over the van to the exclusion of the federal court. The

> fact that the federal authorities muscled in on the van and began an administrative forfeiture proceeding before the state court action was filed did not confer jurisdiction on the federal court." "If the federal authorities wanted the van, they were bound to seek a turnover order from the circuit court of the county in which the van was seized."
>
> "The Ninth circuit stated that it could find no authority (and neither can we) "indicating that a failure on the part of the state court to prosecute, allows the district court to assume jurisdiction.:" 866 F.2d at 1145."
>
> "Elizabeth Anderson's 1979 Chevrolet C-20 van was before the district court improperly, and thus the court had no jurisdiction to order the vehicle forfeited. According, the district court's order is *VACATED* and the case *REMANDED.*"

In the present case, if the AHP is allowed to circumvent the State legislature by dismissing this forfeiture action, it will be a slap in the face to the legislature of the State of Arkansas. The AHP should not be given the power under Federal law to override the wishes of the legislature just to fatten its own office budget. The AHP should not be allowed to circumvent the legislature and fatten their budget at the expense of $600,000.00 to the citizens of the State of Arkansas. Their Motion is improper and should be dismissed.

CONCLUSION

The Circuit Court of Crittenden County, Arkansas obtained In-rem jurisdiction of the $3,166,199.00 in U. S. Currency in Case No. CIV-98-226 on March 9, 1998 and its

jurisdiction is exclusive of any alleged Federal Administrative procedure. The Movant has no legal authority to contest this forfeiture proceeding and are not properly before the Court. Even if the Movant does somehow skirt the legal issues, the Court should look at the facts in this case and make a factual determination that the Crittenden County Prosecuting Attorneys office was the seizing law enforcement agency. The Court should rule that (1) it has exclusive In-rem jurisdiction of this Res in this forfeiture proceeding; (2) that the AHP has no authority to contest this forfeiture action; and (3) that the AHP is not a proper party before this Court pursuant to Rule 24 of the Arkansas Rules of Civil Procedure. The court should rule in the Plaintiffs favor in each and every of the above mentioned legal issues.

Respectfully Submitted,
/S/ James C. Hale, III, Attorney for Plaintiff

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Reply Of Arkansas Highway Police
(Filed April 29, 1998) (R. 132-139)

The Arkansas Highway Police ("AHP") has only appeared in a limited capacity pursuant to Rule 12 and only

because the Court entered an order in this civil matter, without any notice to AHP or even any pleadings having been filed, directing AHP to take an action that it could not and cannot take. Because the Court indicated that AHP was "off the hook" regarding the March 18, 1998, Order, it is unnecessary to consider the other issues raised in the alternative in AHP's motion. AHP would agree that it is not a party to these proceedings since it was never named or served with any pleadings, and no cause of action has ever been alleged against it. Accordingly, although AHP expressly reserves any rights and claims it may have, it still has never been made a party or intervened in this action. AHP is immune from any civil action and venue lies in Pulaski County in any action pursued against it (if any action were filed or remained in state court). Nevertheless, should the Court consider the alternative issues even though AHP believes they are unnecessary to a determination of the issue of whether the March 18 Order should be vacated, AHP continues to assert as respectfully, but as strongly as possible the Court lacked jurisdiction over the subject matter, AHP, or the *res*. If the Court considers the alternative issues, it should also consider the remainder of this reply.

The AHP's decision to cooperate with federal authorities was perfectly appropriate and in the normal course of work for a state law enforcement agency. It is far more accurate to characterize the Deputy Prosecutor's actions as an attempt to circumvent federal law and possibly obstruct an active federal investigation than to mischaracterize AHP's actions as an attempt to circumvent federal law. There is not one provision of Arkansas law that would indicate in any way that state law enforcement agencies are not to cooperate with federal agencies. AHP, as an executive agency, made the decision to notify the federal authorities and did so. *It was the federal authorities who made the decision to adopt the seizure of the money.* That was entirely appropriate. Superintending control over the AHP is given to the Arkansas State Highway Commission, not the

Deputy Prosecutor for Crittenden County. Neither the Court nor the Deputy Prosecuting Attorney possess authority to direct AHP to refuse to cooperate with federal authorities. Ark. Const. art. 4. It is also the federal law that is the supreme law of the land, not the other way around.

In stark contrast to AHP's regular cooperation with federal authorities, it is these proceedings that have been marked with irregularities. First, the Deputy Prosecutor attempted to file this matter as an uncontested forfeiture action. The Notice of Seizure for Forfeiture filed on March 9, 1998, clearly states that the purported proceedings are uncontested. Unfortunately, Ark. Code Ann. § 5-64-509, makes no provision for any filing with the court unless a request for a judicial referral is received from a claimant. More importantly, *uncontested proceedings can only be brought where the value of the assets is $100,000 or less.* Ark. Code Ann. § 5-64-509. Because Ark. R. Civ. P. 3 clearly provides that a civil action is commenced *when the complaint is filed*, and no complaint was filed in this case until March 20, 1998, the Court could not have acquired jurisdiction until March 20, and there was no basis at all for entry of the order on March 18. The seizure had already been adopted by, the money already delivered to, and administrative proceedings commenced by, the DEA before well March 20, 1998.

Another striking irregularity is the fact that search warrants were being issued under and filed in this case, even though forfeiture actions are separate civil actions from the criminal proceedings. The search warrants and the March 18 Order (even if it had been directed toward treating the money as non-fungible evidence) belonged in the criminal case, but that is inconvenient for the Deputy Prosecutor because the criminal proceedings are *in personam*, and do not give the Court exclusive jurisdiction over the *res*. Further, it should be noted that Exhibit B to the Affidavit for Search Warrant, which was drafted with the assistance of the same Deputy Prosecutor who

testified that he thought the money was being taken to the Crime Lab, states: "On 03/09/98 the white paper and the money was transported to Little Rock. The money was secured in a vault belonging to the Arkansas Highway Police and the paper was taken and submitted to the Arkansas State Crime Lab."

Still another irregularity is the March 18 Order. The order was entered under this case number even though no civil action had been commenced. There was no case or controversy before the Court on March 18, 1998. The order might have been appropriate had it been intended to preserve the money for evidentiary purposes and been issued in the criminal case, but the March 18 Order was entered in a civil case that did not exist (not the criminal case), and does not purport to treat or preserve the money as evidence. Instead, the order directed the AHP to deposit the money into a bank, making it fungible, and *wire* it to the Deputy Prosecutor's account. As already mentioned, the order was entered under this civil case number even though no civil action had been commenced, no cause of action has ever been alleged against AHP, no affidavits or verified pleadings or pleadings of any kind accompanied the request for the order, and no notice of the order was given. Interestingly enough, the order makes no mention of the Crime Lab or any misdelivery or conversion of the money.

Still another irregularity is that it was the Court that made the only attempt to notify or serve any person or entity other than Messrs. Zamarripa and Saenz, and that notice still did not fulfill the requirements of Ark. R. Civ. P. 4. The burden of naming the parties, securing service, and providing notice is on the plaintiff. By attempting to cure the failure, the Court placed itself in the position of the Deputy Prosecutor. The notice provided by the Court consisted of a phone call and mailing of the Notice of Hearing by first class mail, and simply could not cure the Deputy Prosecutor's noncompliance with Rule 4 of the Arkansas Rules of Civil Procedure. None of the entities

listed in the Court's notice, including the AHP, have ever been named or properly served by the Deputy Prosecutor and, accordingly have never been properly before the Court.

AHP would call the Court's attention to the case of *United States v. Certain Real Property 566 Hendrickson Boulevard,* 986 F.2d 990 (6th Cir. 1993), which is on point because it deals with the precise issue of whether issuance or filing of a notice of seizure is sufficient to confer exclusive jurisdiction on the state court. In 566 Hendrickson, it was argued that the state court acquired jurisdiction by filing a notice of forfeiture six days before the seizure was adopted by the federal government. The argument was rejected because in Michigan, like Arkansas, the notice does not commence the civil action. It is the complaint, not the notice, that commences the civil forfeiture *in rem* action by which the court acquires exclusive jurisdiction, and not the *in personam* criminal prosecution. In fact, as already pointed out, the notices, warrants, and *ex parte* order put into this case number *before* the filing of the Complaint on March 20, 1998, belonged in the criminal action, not this civil action. Despite the opening of a file by the Circuit Clerk, the fact remains that there was no case or controversy before the Court until March 20, 1998.

The court in 566 Hendrickson held that it is the filing of the forfeiture *complaint* in the state court that brings the *res* within the jurisdiction of the state court, which is consistent with Ark. R. Civ. P. 3. Here, because the DEA adopted the seizure, took possession of the money, and initiated forfeiture proceedings well before the Complaint was filed on March 20, 1998, federal jurisdiction attached before there was any case or controversy in the civil state proceedings. Madewell; $12,390. Arkansas, like Michigan, requires that a Complaint be filed to institute a civil action. Both here and in 566 Hendrickson, the only action pending at the time the notice was issued was the *in personam* criminal action. In sum, no matter how the facts are turned or revised, it remains unarguable that the DEA adopted

the seizure, possessed the money, and instituted forfeiture proceedings before the Deputy Prosecutor filed his Complaint on March 20, 1998. Therefore, like in *United States v. $12,390*, 956 F.2d 801 (8th Cir. 1992) and *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995), exclusive federal jurisdiction attached first.

Scarabin v. Drug Enforcement Administration, 966 F.2d 989 (5th Cir. 1992), which was relied on by the claimant in 566 Hendrickson, is not applicable because Louisiana law had a specific and peculiar provision that expressly provided that the state court's jurisdiction attached when the property was seized. Arkansas has no such provision and, in fact, Ark. R. Civ. P. 3 is much more consistent with the Michigan law at issue in 566 Hendrickson, which provided that actions do not commence until the complaint is filed. Furthermore, the situation in Scarabin was an attempt by an owner or claimant to obtain the return of his property, not an attempt by the State to preempt federal proceedings and possibly obstruct a federal investigation.

The Court should also consider the affidavit of Calvin R. Gibson, which is attached as Exhibit A and the copy of a DEA DAG-72 form, attached as Exhibit B, in which the very same Deputy Prosecutor "circumvented Arkansas law" last year by participating and sharing in a $746,000 seizure by the West Memphis Police Department that was adopted by the federal government. Mr. Gibson is available, for the purpose of establishing the jurisdictional facts relevant to the pending motion only, for deposition or testimony before the Court at any time convenient for the Deputy Prosecutor. Again, it is *not* the Arkansas Highway Police that has acted irregularly regarding this seizure.

In sum, there have been (1) *ex parte* communications by the Deputy Prosecutor with the Court, (2) a Temporary Restraining Order entered without any cause of action being commenced directing a State agency to take an action that it cannot take, (3) a TRO entered without any supporting pleading

or affidavit, (4) search warrants issued in a civil case, (5) a failure to name or properly serve necessary parties, including the one with the money — the United States, (6) an attempt to cure some of the Deputy Prosecutor's errors and secure service on entities that should have been, but were not, named or served by the Deputy Prosecutor, (7) an initial attempt to pursue this matter as an uncontested forfeiture even though the $3.1 Million dollars is 31 and 1/2 times the jurisdictional limit for uncontested proceedings, and (8) an attempt by the Deputy Prosecutor to directly file an uncontested forfeiture proceeding with the Circuit Court even though there is no provision for such a filing in Ark. Code Ann. § 5-64-509, unless a claimant submits a request. Yet in the face of all of the foregoing, it has been AHP's actions mischaracterized as irregular or improper and subjected to scrutiny. That is simply incredible. The AHP's actions, and those of the non-parties, are the only ones that have been proper in this matter. The Deputy Prosecutor who is mischaracterizing the AHP's actions as improper is the same individual responsible for the errors and irregularities set out above.

The documents filed under this case number before the Complaint was filed on March 20, 1998, were simply erroneous filings that either belonged in the criminal case or which were void and should not have been made at all. There is no argument that could possibly be made for the Court acquiring jurisdiction in this civil action before March 20, 1998. The money was in the possession and control of federal authorities and DEA Administrative proceedings had already begun before the civil *in rem* complaint was filed in this case. The Court simply had no jurisdiction to enter the March 18 Order, or take any other action in this case.

Respectfully submitted,
/S/ Robert L. Wilson, Chief Counsel

[Exhibit A (R. 140-141):]

Affidavit Of Calvin R. Gibson

STATE OF ARKANSAS)

) ss

COUNTY OF PULASKI)

Upon being duly sworn, the undersigned Affiant, Calvin R. Gibson, states:

1. My name is Calvin R. Gibson. I have been a licensed attorney in the State of Arkansas since 1989. I am currently employed as a Staff Attorney with the Arkansas Highway & Transportation Department, where my duties include advising and representing officials, employees, and agents of the Arkansas Highway Police and Arkansas State Highway & Transportation Department.

2. In the morning of Monday, March 9, 1998, I received a phone call at my office from a man identifying himself as James C. Hale, the Deputy Prosecutor in Crittenden County, Arkansas. Mr. Hale said he was calling about the seizure of over $3 Million made by officers of the Arkansas Highway Police ("AHP") at the Lehi Weigh Station in Crittenden County on Saturday, March 7, 1998. I advised Mr. Hale that I was generally aware of the matter but that William L. Wharton, another Staff Attorney, was the primary attorney for the AHP on the matter. I told Mr. Hale that based on my reading of Ark. Code Ann. § 5-64-505, both Crittenden County and AHP would receive larger shares of the money under federal forfeiture proceedings. Mr. Hale said that he agreed and that the forfeiture should be pursued federally.

3. At no time during the conversation did Mr. Hale state, imply, or in any way indicate that he had any objection to allowing federal authorities to pursue the forfeiture.

4. The conversation on March 9, 1998, was the only conversation I have ever had with Mr. Hale or anyone else from the Crittenden County Prosecutor's office regarding the seizure.

5. This statement is made under oath this 22d day of April, 1998.

/S/ Calvin R. Gibson, Staff Attorney
Arkansas Highway & Transportation Department
Legal Division
Post Office Box 2261
Little Rock, Arkansas 72203
(501) 569-2271

Subscribed and sworn to before me, the undersigned Notary Public, this 22d day of April, 1998.

/S/ Joanne Moren
Notary Public

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Motion To Reconsider & Request For Specific Findings Of Fact And Conclusions Of Law And Brief In Support
(Filed May 10, 1998) (R. 149-170)

Movant, Arkansas Highway Police ("AHP"), for its Motion to Reconsider and Request for Specific Findings of Fact and Conclusions of Law, states, alleges, and moves:

1. AHP has never been named as a party, nor served, in this action and continues to pursue its alternative motions to vacate and dismiss pursuant to Rule 12. AHP has never entered a general appearance and no cause of action was even pending when the Court entered the March 18 Order. No cause of action has ever been alleged against AHP. AHP has never sought any affirmative relief in the form of a counterclaim or third-party complaint, and has not, and expressly does not, waive jurisdiction, immunity, venue, failure of process, or any other claim or defense in the event that any cause of action is ever alleged against it. No argument to the contrary has ever been presented to the Court, with the exception of the issue of the Court's jurisdiction over the *res*. In fact, the Deputy Prosecuting Attorney has consistently maintained that AHP lacks standing and is not a party before the Court. The immunity argument is

set forth in the supplemental brief accompanying this motion, but all other arguments are adequately contained herein.

2. AHP respectfully submits that the Court's Order signed by the Court on May 8, 1998, contains several specific errors of law and fact, fails to rule on several of the issues in Movant's Rule 12 motion, fails to make several essential findings of fact, and should be set aside or modified significantly to correct the mistakes and errors to avoid a miscarriage of justice.

3. In paragraph 1 of the May 8 Order, the Court found that AHP was a party to this case and subject to the Court's jurisdiction. That issue was never before the Court because it was not disputed by the plaintiff or AHP. Further, AHP has never asked for any affirmative relief by way of counterclaim or third-party complaint, so AHP has never waived venue or its immunity.

a. AHP has only moved for relief under Rule 12, which abolished any requirement for special appearances. The witnesses and evidence presented at the April 1, 1998 Hearing were for the purpose of establishing jurisdictional facts for the purpose of AHP's Rule 12 motion. AHP could have properly and lawfully ignored the Court's March 18 Order, which was and continues to be void for the reasons set out previously and below, but believed that filing a Rule 12 motion and attending its hearing would be more respectful to the judiciary by affording the Court an opportunity to correct its error. AHP has still never been made a party, has had no cause of action alleged against it, has never been served with process, and is still immune pursuant to

> Ark. Const. art. 5, § 20. *See also, Arkansas Dep't of Human Services v. Bailey*, 318 Ark. 374, 885 S.W.2d 677 (1994) (agency is not subject to court's orders until it is named and served); *Department of Human Services v. Crunkleton*, 303 Ark. 21, 791 S.W.2d 704 (1990). The finding that AHP is a party is also directly contradicted by the Court's finding in paragraph 4 of the May 8 Order that "the Arkansas Highway Police has no authority [(*i.e.*, no standing)] to object to the present State forfeiture action..." The finding in paragraph 4 confirms the only issue that AHP and the Deputy Prosecutor have agreed on since the initial decision to pursue the federal forfeiture — that AHP has never been, and is not, properly before the Court. The Court's May 8 Order says that the AHP is subject to the Court's orders, but has no standing to challenge them. Such a ruling runs counter to any notion of fair play or even rough justice.

4. Furthermore, venue in any cause of action asserted against AHP, should one ever be alleged, lies in Pulaski County, Arkansas. The AHP is a division of the Arkansas State Highway & Transportation Department and venue for all such actions is governed by Ark. Code Ann. § 27-65-134 (Repl. 1994). *See, Arkansas Highway Commission v. Holt*, 190 Ark. 868, 81 S.W.2d 929 (1935).

5. In paragraph 2 of the May 8 Order, the Court stated "that there was not substantial evidence presented to the Court that there was a pending Federal forfeiture prior to this Court obtaining jurisdiction..." The finding is clearly erroneous on both law and fact for several reasons.

a. First, the Court improperly shifted the burden of proving the jurisdiction of the Court to AHP. It was, and is, the plaintiff's burden to plead and prove that the Court has jurisdiction of the alleged cause of action. Fausett v. Host, 315 Ark. 527, 868 S.W.2d 472 (1994) (burden is on plaintiff to plead and prove the jurisdictional facts). The Deputy Prosecuting Attorney did not even allege, and produced no evidence, that the Money was within the jurisdiction of the Court on March 20, 1998, when he filed the Complaint in this action. The Complaint contains only the conclusory statement that jurisdiction is proper, but contains no facts, and therefore was insufficient. The Deputy Prosecuting Attorney could also have demonstrated the Court's jurisdiction, if it existed, by producing the Money or depositing it into the Court's registry at any time during which he supposedly was in possession as the "seizing agency."

b. The fact that the seizure had already been adopted and federal proceedings were underway by the time the Complaint was filed on March 20, 1998, was not refuted. The undisputed testimony of Ray Davis was that he was on assignment to the DEA from the AHP and had been since 1990, was a sworn DEA Task Force Officer and DEA Special Agent, was authorized to make federal seizures, had made federal seizures in the past, and adopted this seizure on the evening of March 7, 1998. Tr. 84, 99, & 108-09. It was also undisputed that the shake test papers were taken to the State Crime Lab and the Money was transported to the AHP vault in

Little Rock on March 9, 1998. See Order (March 18, 1998) (prepared by Prosecuting Attorney's Office); Exhibit B to Affidavit for Search Warrant (prepared by Prosecuting Attorney's Office) issued and returned herein (even though this is a *civil* action). It was undisputed that the Money was delivered to the DEA on March 10, 1998. Tr. 91-92. It was also undisputed that the formal paperwork for initiating DEA administrative forfeiture proceedings had been completed by March 16, 1998. Tr. 114.

c. The only argument made by the Deputy Prosecuting Attorney that the Court acquired *in rem* jurisdiction was that a Notice of Seizure for Forfeiture was filed (without notice or service to AHP) on March 9, 1998. Even though no provision for filing uncontested forfeitures is contained in Ark. Code Ann. § 5-5-509, the filing still occurred after Special Agent Davis adopted the seizure on March 7, 1998.

d. More importantly, the notice, like a second one filed later, expressly stated that *uncontested* forfeiture proceedings were being instituted and made no request for relief from the Court. Ark. Code Ann. § 5-64-509 expressly states that uncontested proceedings can be brought *only if* the value of the assets is less than $100,000. The notices did not commence any action.

e. Rule 3 of the Arkansas Rules of Civil Procedure expressly requires a complaint to be filed with the court clerk for an action to be commenced. The Complaint in this case was

not filed until March 20, 1998, well after the undisputed evidence clearly established that the seizure had been adopted, the Money delivered to the DEA, and federal administrative proceedings begun. It was never disputed that the DEA took possession of the Money and the other federal actions took place on the dates indicated. Again, the burden of demonstrating the Court's jurisdiction was the Deputy Prosecutor's, but the testimony alone is substantial evidence. Most telling of all is the fact that the Court cannot enter an order reaching the Money, as demonstrated by the fact that the Court found that the AHP could not comply with the March 18 Order, even if it were not void. In any event and even though the burden of establishing jurisdiction is supposed to be on the Deputy Prosecuting Attorney, AHP's the undisputed evidence clearly proved that the Court lacked jurisdiction, and the Court's finding is both clearly erroneous and an error of law to the extent that it concludes that the evidence was not substantial. See, *supra*, at ¶ 5.b. The seizure was adopted by the DEA on March 7, 1998, federal administrative forfeiture proceedings were begun immediately, and the formal paperwork was completed by March 16, 1998 — all before March 18, 1998, when the void *ex parte* Order was entered, or March 20, 1998, when the Complaint, which would have commenced this case in the absence of the federal proceedings, was filed.

6. The Court also improperly shifted the burden of proof to AHP to demonstrate the invalidity of the March 18 Order. This is a civil matter and the request for the March 18

Order was governed by Ark. R. Civ. P. 65. The burden was again the Deputy Prosecutor's to demonstrate that he was entitled to the requested relief and the burden is a heavy one. That is why Ark. R. Civ. P. 65 requires verified pleadings or supporting affidavits, an attempt to provide some notice to the target of the TRO, service of the TRO pursuant to Ark. R. Civ. P. 4, a showing of irreparable harm, and a likelihood of success on the merits of the action alleged, ***none*** of which was done in this case. The request for the March 18 Order and the Order itself violated *every single* requirement of Rule 65. The Order did not recite the reasons or basis for its issuance as required by Rule 65. Again, no cause of action has *ever* been alleged against AHP — even now. Even if there had been, there was no showing of irreparable harm or likelihood of success in such an action. There was no written motion requesting the order, there was no verified pleading, there were no supporting affidavits, and there was no cause of action even pending against AHP. AHP respectfully submits that even in the absence of the Court formally vacating the March 18 Order, the Order is void and a nullity, as would be any additional directives entered until a cause of action is alleged against AHP and AHP is named as a defendant and properly served.

7. In paragraph 3 of the May 8 Order, the Court made a factual finding that the AHP took possession but that the Prosecuting Attorney's Office was the "seizing agency." At the April 1 Hearing the Court said that it thought the AHP was clearly the seizing agency. That initial announcement from the bench was correct. The finding in the May 8 Order is contrary to the evidence presented, including that presented by the Deputy Prosecuting Attorney, and contradicts itself and the plain meaning of the word "seizure." The May 8 finding also conflicts with the language of Ark. Code Ann. §§ 5-64-501 & 5-64-505(b), which provided Officer Smith with the authority to make the seizure and expressly contemplates that warrantless seizures

can be made without any involvement of the prosecuting attorney.

a. The undisputed evidence was that Officer Smith seized the Money when Mr. Zamarripa was arrested. No one would have been free to take the Money and leave. A "seizure" is "[t]he act of taking possession of property, *e.g.*, for a violation of law or by virtue of an execution of a judgment. The term implies a taking or removal of something from the possession, actual or constructive, of another person or persons." Black's Law Dictionary 1359 (6th ed. 1990). Officer Smith arrested Mr. Zamarripa and took the Money from the possession of Mr. Zamarripa, as conceded by both the Court and the Deputy Prosecutor. That constituted the seizure.

b. The Money has never even been in the possession of the Deputy Prosecutor, and the argument is simply bizarre coming from the Prosecuting Attorney's Office when it is supposed to be pursuing a parallel criminal action, because it would make the prosecutor not just a link, but the entire chain of custody, and disqualify him from representing the state in the criminal proceedings. Every receipt and every bit of testimony presented, *by both AHP and the Deputy Prosecutor*, clearly demonstrated that the Money was in the possession of the AHP from the time it was found until it was delivered to the bank in Marion. The receipt issued to the bank was from the AHP on an AHP form, and the Money was returned to the AHP on Monday, March 9, 1998. While it was being counted at

the bank on Sunday, March 8, 1998, AHP officers and personnel were present, but the Deputy Prosecutor was not. After the AHP again took physical possession of the Money on March 9, it remained in the sole and possession of the AHP until it was delivered to the DEA. At no time did the Deputy Prosecutor, Mr. Hale, III, or the Crittenden County Sheriff take possession of the Money or request that the Money be deposited into its account, which according to the March 18 Order is at the very same bank to which the Money was transported on the night of March 7, 1998. At no time did the Court issue any order regarding the Money as part of the criminal proceeding (which is *in personam* and would not have established exclusive jurisdiction over the *res*, anyhow).

c. There cannot be a seizure without possession and the Prosecuting Attorney's Office has never had possession of the Money at any time (as admitted by its actions in seeking the March 18 Order). The notion of a seizure without possession defies law, fact, and reason, and the plain meaning of the word. In fact, as conceded by the Deputy Prosecutor's testimony and arguments, the Deputy Prosecutor was trying to avoid being the "seizing agency" in order to stay out of the chain of custody. The Deputy Prosecutor was present at the weigh station for only 30 minutes to one hour (arriving after the arrest, after the search, after the money had been removed from the truck and placed in the weigh station office, after the weigh station had been closed, and after access to the area had been restricted). Neither of the Messrs. Hale

was present at the bank at all. The *undisputed* testimony and evidence is that Mr. Zamarripa was placed under arrest and the Money was removed from the truck into the weigh station office, the weigh station closed, the area secured, and access to the area closed, all before the Deputy Prosecuting Attorney ever arrived at the weigh station on March 7, 1998. Tr. 53-54.

d. Furthermore, accepting the Deputy Prosecutor's definition of "seizing agency" makes the Prosecuting Attorney's Office the entire "chain" in the "chain of custody." If the Prosecuting Attorney's Office is, in fact, the "seizing agency" as a matter of law whenever a police officer makes a seizure, then the office could *never* handle another criminal prosecution because it would be disqualified whenever *any* of the evidence could conceivably be subject to forfeiture. A prosecuting attorney is the state's *attorney*, and is not a law enforcement officer or agency. Indeed, there was no evidence presented that either of the Hales are certified law enforcement officers. Prosecuting attorneys do not execute warrants and have no power to make arrests beyond that of any other citizen. Ark. Code Ann. § 16-21-147(b)(2). In fact, prosecuting attorneys must be specially designated by statute as law enforcement officers for the purpose of using some types of communication equipment. Ark. Code Ann. § 16-21-147(b)(1). If prosecuting attorneys were law enforcement officers, no such authorization or provision would be needed. In the absence of that authorization, prosecuting attorneys would not be able to lawfully use such

equipment. Why? Because prosecuting attorneys are *not* law enforcement officers. Clearly, Arkansas law treats "law enforcement officers" and "law enforcement agencies" as completely different entities from "prosecuting attorneys" or "states' attorneys."

e. Officer Smith was authorized to make the seizure pursuant to Ark. Code Ann. § 5-64-501, and did so during a warrantless consensual search (which is clearly contemplated in the language of Ark. Code Ann. § 5-64-505(b) about "seizure without process"). It should also be noted that the Consent to Search Form is also an AHP form. As previously noted, superintending control over the AHP is given to the Arkansas State Highway & Transportation Department and the Arkansas State Highway Commission, not the Deputy Prosecuting Attorney of Crittenden County. The Money remained in the custody and control of the AHP from the time it was seized until it was delivered to the DEA, with the only questionable time period being while it was held in the bank when it could be argued that the bank had possession. Every receipt was issued by or to AHP, and not a single receipt nor any other evidence ever indicated that the Money was ever in the possession of the Prosecuting Attorney's office.

f. In addition, the statute specifically refers to "seizing law enforcement agency," not simply "seizing agency." The statute, like every other statutory provision, uses "law enforcement agency" to mean a police department or sheriff's department and uses the terms of "state's

attorney," "attorney for the state," "prosecutor," or "prosecuting attorney" when referring to the Prosecuting Attorney's office. Each is assigned different powers, duties, and functions, and they are not the same. A prosecuting attorney is supposed to be the state's attorney, not a police officer. AHP is a "law enforcement agency," the Crittenden County Prosecuting Attorney's Office is not.

8. In paragraph 4, the Court misidentified the issue. The issue is whether the federal government may adopt a seizure and pursue it federally, and the cases previously cited; *Madewell v. Downs*, 68 F.3d 1030 (8th Cir.); *United States v. $12,390*, 956 F.2d 801 (8th Cir. 1992); *United States v. Certain Real Property 566 Hendrickson Boulevard*, 986 F.2d 990 (6th Cir. 1993); clearly answer in the affirmative.

a. AHP did not "direct" (in the sense the word is used in the May 8 Order) a state forfeiture case — no case had even been commenced — and AHP did not "command" the DEA to commence the administrative forfeiture action. The DEA, in *its* discretion, adopted the seizure and initiated administrative forfeiture proceedings, and properly so. AHP advised the DEA of the seizure and requested that the DEA adopt the seizure to pursue the forfeiture federally, but the fact remains that the DEA could have adopted the seizure even if AHP *and* the Prosecuting Attorney objected. The DEA seizure would still have been a valid adoption, precluding this Court from exercising jurisdiction.

b. In any event, the notification of the DEA, and AHP's request for assistance, are

> administrative and discretionary functions of an executive agency, which, again, is not subject to review by this Court because of the separation of powers of the Arkansas Constitution. Ark. Const. art. 4. Neither the Court nor the Deputy Prosecutor have presented a single statutory or constitutional provision that would prohibit AHP from advising the DEA of seized assets and contraband. If there is one, the Deputy Prosecuting Attorney should allege a cause of action over which a court has jurisdiction of the subject matter and the jurisdiction to grant the requested relief, file the action in the proper venue, obtain proper service on AHP, and otherwise properly plead and prove a civil cause of action against AHP. The Deputy Prosecuting Attorney is the plaintiff in this matter, yet has failed to file any pleading alleging the Court's jurisdiction over AHP.

9. The Court's finding that AHP's actions have been "merely to circumvent State statutes" is also clearly erroneous and requires an additional response that AHP has not wished, and is reluctant but duty-bound, to make. Although AHP has never denied that the $250,000 cap was a consideration in its decision to contact the DEA, AHP put forth numerous other reasons in support of the propriety of federal proceedings and its desire to see the matter pursued federally, including: (1) the truck was in interstate commerce when it was stopped by AHP; (2) the stop was initially for an administrative-type inspection authorized by both state and federal law (federal authorization possibly being necessary to avoid Commerce Clause questions); (3) counterfeit currency was found and counterfeiting is clearly an exclusively federal interest; (4) the only felony charge alleged in state court so far has been for money-laundering (which is not one of the statutory grounds for civil forfeiture

under state law) and money-laundering has traditionally been primarily a federal interest; and, most importantly, (5) the incident obviously requires a multi-state investigation of other possible crimes, which is clearly the province of the DEA, and (6) the sheer size of the seizure.

a. In addition to the foregoing reasons, which were known at the time of the seizure and federal adoption, AHP has learned of an additional reason why federal forfeiture proceedings are more appropriate: the manner in which state forfeitures are handled by the Prosecuting Attorney's Office in Crittenden County. Attached are copies of orders (and in some cases, the initial pleading) in all civil forfeiture cases involving $100,000 or more in Crittenden County since 1994. See attached Exhibits 1 - 7. The Exhibits demonstrate that there has been a pattern of improperly, and possibly illegally, using uncontested forfeiture proceedings to forfeit assets in excess of $100,000 in value. Ark. Code Ann. § 5-64-509 clearly limits uncontested forfeiture proceedings to assets of less than $100,000 in value. AHP would submit that the orders in those cases may well be void.

b. Also, as clearly shown in Exhibits 1 - 7, the $250,000 cap, which the Deputy Prosecuting Attorney has argued is improper for consideration, has clearly been routinely considered and ignored by the Crittenden County Prosecuting Attorney's Office. The argument that the Deputy Prosecuting Attorney is attempting to protect the integrity and enforcement of state law regarding civil

forfeitures is, at best, disingenuous and specious. When it is also considered (1) that Crittenden County does not even have an official drug task force, (2) that the only oversight is after the fact by Legislative Audit, which is limited only to the Prosecuting Attorney's accounts (and not local task forces or similar non-entities that may receive funds), (3) that the Deputy Prosecuting Attorney has authority to handle the accounts with no control or oversight of the Deputy Prosecuting Attorney, (4) that the contract to handle all state asset forfeitures in Crittenden County is in the hands of the son of the Deputy Prosecuting Attorney (who argued that his 35 years of influence provided the assistance in obtaining a prompt report from the Crime Lab), and (5) that the Deputy Prosecuting Attorney is taking the position in this case that it is the seizing agency, which would make the Prosecuting Attorney the chain of custody and apparently kill the state criminal prosecution, it is not mere idle speculation to envision that the persons, entities, and enterprises involved in pursuing such proceedings could be subjected to at least potential civil liability under 42 U.S.C. § 1983 or 18 U.S.C. §§ 1961 to -1965 (RICO). In fact, the agreed order in $322,450 contains a paragraph in which the claimant waives his right to sue, apparently in exchange for the $72,450 that was ordered returned to him.

c. AHP also submits that the consideration of the $250,000 cap in its decision to declare AHP's actions improper violates the doctrine of *stare decisis*, which requires consistent application of the same standards of law to all

persons or parties before the court. The doctrine of judicial estoppel precludes the Deputy Prosecuting Attorney from even asserting the argument for consideration. The Crittenden County Prosecuting Attorney's Office's handling of the state forfeitures clearly demonstrates that even though it is nominally designated as the state's attorney and even though the cases have been filed in the name of the State of Arkansas, the real plaintiff in interest has been the Crittenden County Prosecuting Attorney's Office, to whom *all* of the forfeited funds have been directed — even when the value of the *res* exceeded the $250,000 cap. Quite obviously, the interests of the taxpayers in 74 other counties in this State have not been represented by the Prosecuting Attorney's Office in these matters. In light of the foregoing and the summaries of three cases that follow, AHP submits that the federal proceedings are also more consistent with the intent of the state law than this state proceeding itself. These considerations will certainly be taken into account in future seizures made by the AHP. AHP would also respectfully remind the Court that at the April 1 Hearing neither the Court nor the Deputy Prosecuting Attorney could recall any assets being deposited into the State Police fund established for proceeds in excess of the $250,000 cap.

1) In *State v. $451,630, et al.*, No. CIV 97-294 (Crittenden Co. Cir. Ct., October 6, 1997). Even though only one case number was assigned and it was an *in rem* action against a *res* of $451,630, the order directed the entire $451,630 forfeited to the Crittenden County Prosecuting Attorney's Office despite the fact that the Ark. Code Ann. § 5-64-505 required any

proceeds forfeited under state law in excess of $250,000 to be forfeited to the State Police fund. Even though the proceedings was *in rem* and there was only one *res*, the Court's order creatively assigned one-half of the *res* to one occupant of the vehicle from in which it was found and one-half of the res to the other such occupant, "merely to circumvent State Statutes regarding the disbursement of forfeited funds."

2) *State v. $322,450, et al.*, No. CIV 95-297 (Crittenden Co. Cir. Ct., August 18, 1997). This case was resolved by an Agreed Order and forfeited $250,000 to Crittenden County Prosecuting Attorney's Office while the remaining $72,450 was returned to the defendant.

3) *State v. 1986 Chevrolet P/U, et al.*, No. CIV 98-94 (Crittenden Co. Cir. Ct., April 17, 1998). This forfeiture included $354,035, the entire amount of which was forfeited to the Crittenden County Prosecuting Attorney's Office. The notice of seizure is included to show that this case was improperly instituted as an uncontested proceeding.

d. It should be noted that even though all of the cases are styled in the name of the State of Arkansas, every order directs the assets to the Crittenden County Prosecuting Attorney's Office. Although AHP has, so far, only checked cases in Crittenden County appearing to involve $100,000 or more, it has been unable to locate a single instance of an order of forfeiture directing any proceeds to the State of Arkansas. At best, only the taxpayers of Crittenden County have benefited (if they) from the state forfeitures brought in that county. Even in hindsight, not only was contacting advising federal authorities proper, prudent, and in the interest of most of the taxpayers of this State, it would have been

unwise and perhaps improper or unlawful not to do so. In addition to being entirely legal and proper, *it was the right thing to do.* The $250,000 cap is not the bad part of the law. The bad part of the law is the absence of meaningful oversight, control, and auditing of the assets in the Deputy Prosecutor's possession, and the concentration of huge sums of money in the hands of a few local officials. The problem the $250,000 cap sought to address was the well known problems that have unfortunately occurred in a few local jurisdictions, not the activities of the AHP, the Arkansas State Police, or other law enforcement agencies with state-wide jurisdiction. The state-wide agencies are subject to much more accountability and control in the handling of money, where control rests in the hands of more than one individual. The problems of checks and controls on human nature is as old as the Republic.

10. The Court's finding in paragraph 5 is also clearly erroneous and again misidentified the issue. The Crittenden County Prosecuting Attorney's Office has no "*right*" to pursue any forfeiture action. The Prosecuting Attorney has the discretion, authority, or power, to do so, not some inalienable right. The Prosecuting Attorney does *not* have the power, authority, or "*right*" to dictate to federal authorities or defeat the proper jurisdiction of the federal government on a whim. Federalism requires the state to respect proper federal jurisdiction as much as it requires the federal government to respect proper state jurisdiction.

a. Here, exclusive state jurisdiction never attached to the *res*. The notices were void and did not commence any proceedings. The

> $3,166,199 is over 31 and 1/2 times Ark. Code Ann. § 5-64-509's jurisdictional limit. The only other evidence presented by the Deputy Prosecutor of any state involvement with the *res* were warrants, receipts, and documents from the criminal proceedings. (In a very odd and wholly void and improper maneuver, a search warrant was even issued and returned in this case, which is a civil proceeding.) However, it is well established that the criminal proceedings are *in personam* and do not establish exclusive state jurisdiction over the *res*, and that civil forfeiture actions are completely separate. This separate civil *in rem* action was not commenced until March 20, 1998. Ark. R. Civ. P. 3. The filemark on the Complaint is conclusive. It is the state court, not the prosecuting attorney, that must acquire jurisdiction of the *res*, and that jurisdiction can only be acquired under Arkansas law by the filing of the complaint. The issue of waiver by the Prosecuting Attorney is irrelevant to whether federal jurisdiction attached first.

11. In any event, the testimony of Mr. Hale, Jr., indicating that he did not agree or acquiesce to the federal proceedings, that he objected to federal proceedings, and, especially, that he directed that the Money be forwarded to the Crime Lab, is contradicted by:

> 1) the testimony of Officer Smith, Capt. McLean, William L. Wharton, and Chief Burks, the Affidavit of Calvin R. Gibson;
>
> 2) Exhibit B to the Affidavit for Search Warrant (which was prepared by Mr. Hale, Jr.'s office for Officer Smith's signature);

3) the absence of any evidence of any request by the Deputy Prosecuting Attorney to AHP for the return of the Money to Crittenden County;

4) the absence of any evidence of any request to, or attempt to obtain an order directing, the Crime Lab (where Mr. Hale, Jr. testified he thought the Money was located) to return the Money;

5) the absence of any mention of the Crime Lab or misdelivery of the Money in the Court's March 18 Order (prepared by Mr. Hale, III) and the fact that the March 18 Order does clearly say that the Money was "removed by the Arkansas Highway Police from Crittenden County, Arkansas and forwarded to the Arkansas Highway Police Headquarters located in Little Rock";

6) the absence of any evidence of any attempt on the part of Mr. Hale, Jr. to contact the Crime Lab about the location or status of the Money (even though he used his long-time tenure to expedite the shake test results); and,

7) the fact that the March 18 Order directs AHP to deposit the Money and wire the funds to the Deputy Prosecutor, making the funds fungible and destroying any evidentiary value of the Money that the AHP supposedly destroyed by transferring the Money to the DEA.

a. AHP submits that any finding that the Deputy Prosecutor did not agree to the transfer of the Money out of Crittenden County and the Second Judicial District is clearly erroneous, since the Money was removed, the Deputy Prosecutor knew it had been removed, and no request or attempt was made to retrieve the Money until 9 days later, after the Deputy Prosecutor's demand that AHP join in his request to the DEA for a 15 percent share of the federal forfeiture was rebuffed.

12. The Court's finding in paragraph 6 that the AHP could not comply with the March 18 Order is correct, but AHP continues to point out that because there was no effort on the part of the plaintiff to commence a cause of action against AHP, serve AHP, or comply with Rule 65 of the Arkansas Rules of Civil Procedure, the March 18 Order was and is void, even aside from the other jurisdictional flaws.

13. Further, with respect to any cause of action, or other request by the Deputy Prosecuting Attorney for an order directing AHP to take any action, AHP expressly reserves its objections to venue, jurisdiction, immunity, failure of process, the pendency and primacy of the federal action, all other defenses and claims. Accordingly, this proceeding would also be moot, even if the Deputy Prosecutor requested a remedy.

14. The Court stated at the April 1 Hearing, "I don't see any reason why [the federal government] can't answer a subpoena — why they can't be brought in as necessary parties, and I think they should be." Tr. 165. The Court went on to note that naming the United States would almost certainly result in removal to federal court. Unless and until the United States is brought into these proceedings, any order rendered by the Court, even assuming away the other arguments, is moot.

Indeed, in addition to no cause of action having been alleged, no remedy has even been requested by the Deputy Prosecuting Attorney. As the Court also noted, it is up to the Deputy Prosecuting Attorney to name and serve the United States. Tr. 165-166. Once again, the Deputy Prosecuting Attorney has never even named or served the AHP. This is an *in rem* action, and without the *res*, the Money, there is no present case or controversy before the Court for which the Court possesses jurisdiction to enter a remedy.

15. Still relying on Rule 12, AHP respectfully requests that the Court make the following findings of fact related to the Court's jurisdiction:

a) the date the State forfeiture action was commenced;

b) the location of the Money on the date the State forfeiture action was commenced;

c) if different from the unrefuted testimony of Ray Davis, the respective dates when the federal government adopted the seizure, took possession of the Money, and instituted its administrative proceedings;

d) if the Court finds that the Prosecuting Attorney seized the Money, the date Prosecuting Attorney seized the Money and the facts constituting the seizure; and,

e) the date and circumstances that the Prosecuting Attorney acquired possession of the Money.

16. Still relying on its Rule 12, AHP also respectfully requests specific rulings on the following legal issues, which are related to the Court's jurisdiction:

a) whether the Deputy Prosecuting Attorney put forth any substantial evidence, and the nature of that evidence, demonstrating that he or his client complied with Rule 65 and was entitled to the March 18 Order;

b) whether the March 18 Order is of any legal effect, modified, or vacated;

c) whether venue is correct;

d) whether AHP is immune;

e) whether AHP was properly served with process pursuant to Ark. R. Civ. P. 4, the date and manner of such service, and on whom it was made;

f) whether all of the necessary and proper parties, including the United States, were named and served by the real plaintiff in interest;

g) whether the State judicial branch has authority under Article 4 of the Arkansas Constitution to prohibit a law enforcement agency of the State's executive branch from cooperating with federal law enforcement agencies or advising them of the existence of investigations and possible violations of federal law;

h) whether the burden of pleading and proving the court's jurisdiction is on the real plaintiff in interest;

i) which allegations of fact in the Complaint establish *prima facie* that the Court possesses jurisdiction and that venue is proper, and, further, which of those facts were proven;

j) which allegations of fact in the Complaint establish *prima facie* that the Court possesses jurisdiction over AHP for the purpose of these civil proceedings and, further, which of those facts were proven;

k) whether the real party in interest as the Plaintiff in these proceedings is the Crittenden County Prosecuting Attorney's Office, the Deputy Prosecuting Attorney for Crittenden County, the Arkansas State Police, the Arkansas Highway Police, Crittenden County, the non-existent Crittenden County Drug Task Force, the State of Arkansas, or some or none of the above;

l) whether the undisputed testimony and evidence of the DEA's adoption of the seizure on March 7, 1998, constitutes substantial evidence of the federal adoption;

m) whether the United States and AHP are necessary parties; and

n) whether this case is moot.

THEREFORE, Movant respectfully and reluctantly requests that the Court vacate it March 18 Order, reconsider

and vacate its May 8 Order, and rule on the specific issues listed above and raised in Movant's motions.

Respectfully submitted,
/S/ Robert L. Wilson, Chief Counsel

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

State Of Arkansas' Response To The Arkansas Highway Police's Motions To Reconsider And Requests For Specific Findings Of Fact And Conclusions Of Law
(Filed June 16, 1998) (R. 226-227)

Comes the Plaintiff, State of Arkansas, and for its Response to the Arkansas Highway Police's May 18, 1998 and June 11, 1998 Motions to Reconsider and Request for Specific Findings of Facts and Conclusions of Law, states:

1. That the allegations requesting the Court to reconsider its Orders as set forth in the Arkansas-Highway Police's Motions were either decided by the Court at the April 1, 1998 hearing, or not advanced by the Arkansas Highway Police at the April 1, 1998 hearing.

2. That the issues not advanced at the April 1, 1998 hearing are untimely and should be stricken by the Court pursuant to Arkansas Rules of Civil Procedure 12(f).

3. That specific findings of fact and conclusions of law are not required pursuant to Arkansas Rules of Civil Procedure 52(a) with reference to the issues the Arkansas Highway Police tried to the Court on April 1, 1998.

4. That however, the State of Arkansas has no objections to the Arkansas Highway Police and the State of Arkansas both simultaneously submitting proposed findings of fact and conclusions of law to the Court for its consideration, if the Court deems the findings and conclusions are necessary.

WHEREFORE, the State of Arkansas prays that the Arkansas Highway Police's Motions to Reconsider be denied, and the State of Arkansas has no objections to specific findings of fact and conclusions of law.

Respectfully Submitted,
/S/ James C. Hale, III, Attorney for the Plaintiff

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Memorandum Brief In Support Of State Of Arkansas' Response To The Arkansas Highway Police's Motions To Reconsider And Requests For Specific Findings Of And Conclusions Of Law
(Filed June 16, 1998) (R. 228-229)

The Arkansas Highway Police fully participated in the April 1, 1998, hearing and tried the issues to the Court. The Court decided the issues raised by the Arkansas Highway Police. However, the Arkansas Highway Police, using a "shotgun" approach, has filed two motions to reconsider that advance a plethora of new arguments.

The Court clearly adequately addressed the issues raised at the hearing, and the new arguments are not timely. The State of Arkansas contends the Arkansas Highway Police's motions should be denied.

Arkansas Rules of Civil Procedure 52(a) provides as follows:

> (a) Effect. If requested by a party, in all contested actions tried upon the facts without a jury the court shall find the facts specially and state separately its conclusions of law thereon,

> and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set froth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a mater, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions motion under the Rules.

(emphasis added).

Although the Court is not required to make specific findings of fact and conclusions of law, the State of Arkansas has no objection to simultaneously with the Arkansas Highway Police, submitting proposed findings of fact and conclusions of law for the Court to consider.

Respectfully Submitted,
/S/ James C. Hale, III, Attorney for the Plaintiff

IN THE SUPREME COURT OF ARKANSAS

In The Matter Of $3,166,199 Case No. 98-957

Arkansas Highway Police Appellant

v.

Crittenden County Prosecuting Attorney's Office;
Brent Davis, Prosecuting Attorney For
The Second Judicial District;
And State Of Arkansas, Nominal Plaintiff Below Appellees

Appellant's Brief
(Filed August 24, 1998)

Because of the irregularities of the proceedings, AHP is admittedly unsure whether it is entitled to perfect an appeal, but because of the clear effort to affect AHP's interest, the exception for non-party appeals should apply. *E.g.*, In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990) (in absence of service of process judgment against non-party was appealable and void). The trial court ruled that AHP was a party in its May 8 order, but ruled that AHP was not a party in its July 18 order, entered after it lost jurisdiction to amend the May 8 order. Alternatively, the Court may treat this appeal as a request for certiorari, prohibition, or mandamus. To the extent that the Court treats this appeal as a petition for certiorari, prohibition, and/or mandamus, the evidence adduced at the April 1 hearing is part of the record and appropriate for consideration of the trial court's jurisdiction in deciding whether to grant the writ. "Where the evidence adduced is pertinent to the determination of the lower tribunal's authority to take the action questioned, it is a part of the record." *McKenzie v. Burris*, 255 Ark. 330, 340, 500 S.W.2d 357, 364 (1973) (Fogleman, J.).

I. THE TRIAL COURT ERRED IN RULING THAT IT HAD JURISDICTION OVER THE *RES* BECAUSE (A) THE SEIZURE WAS ADOPTED BY THE DEA, (B) THE CURRENCY WAS TRANSFERRED TO FEDERAL POSSESSION, AND (C) FEDERAL ADMINISTRATIVE PROCEEDINGS WERE COMMENCED, ALL BEFORE THE COMPLAINT WAS FILED

The law regarding the trial court's jurisdiction over the *res* is provided by *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995); *United States v. $12,390*, 956 F.2d 801 (8th Cir. 1992); *United States v. Certain Real Property 566 Hendrickson Boulevard*, 986 F.2d 990 (6th Cir. 1993); and Ark. R. Civ. P. 3. The jurisdictional facts adduced at the hearing conclusively established that the Currency was in the custody and jurisdiction of the United States when the complaint was filed. The Deputy Prosecutor never pled or proved facts showing the trial court's jurisdiction and the clearest indication of the lack of jurisdiction is that the *res* was not in the registry of the court, nor in the hands of the Deputy Prosecutor or any other party or person served when the complaint was filed, and thus no order could have been entered for anyone to produce the *res*.

It was unrefuted that a sworn special agent and Task Force Officer for the DEA, authorized to make arrests under federal authority, open federal investigations, and make federal seizures of assets, adopted the seizure between 8:15 and 10:00 p.m. (*before* the Deputy Prosecutor was even called) on March 7, 1998. A. 182-185, 191-192, 194-196. *See also*, 21 U.S.C § 878. The Currency was transferred to AHP Headquarters on Monday, March 9, 1998, and the DEA took custody of the Currency on the morning of Tuesday, March 10, 1998. It was unrefuted that the paperwork confirming the initiation of the

DEA administrative forfeiture proceedings had been completed on or before March 16, 1998, when the DAG-71 forms were forwarded to AHP by the DEA. A. 199.

On Monday, March 9, 1998, without notice to or service on AHP or the United States, the Deputy Prosecutor filed a Notice of Seizure for Forfeiture, purporting to initiate *uncontested* forfeiture proceedings, A. 23, but uncontested proceedings may be used "***only if***" the cumulative value of the assets is $100,000 or less. Ark. Code Ann. § 5-64-509(b) (emphasis added). No cause of action was commenced until the complaint was filed on March 20, 1998. Ark. R. Civ. P. 3 (civil action is commenced by filing of a complaint). The plain language of Rule 3 and Ark. Code Ann. § 5-64-509(b) makes clear that no state proceeding was commenced by the notices (which were never served on AHP or the United States). The $3,166,199 is over *31 and 1/2 times* the jurisdictional limit for instituting uncontested proceedings. The notices were never even argued to constitute a complaint, do not contain a concise statement of facts or a prayer for relief, and were not even addressed to the court. See Ark. R. Civ. P. 8(a). The complaint (which contains no certificate of service and was again served with summons on Zamarripa and Saenz) was filed thirteen days after the adoption, ten days after federal possession, and at least four days after the initial administrative paperwork had been completed.

Civil forfeitures are separate civil actions, *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996), governed by the Arkansas Rules of Civil Procedure. *See, Sosebee v. County Line School District*, 320 Ark. 412, 897 S.W.2d 556 (1995) (Rules apply unless statute specifically provides for different procedure). No state action was commenced until March 20, 1998.

In 566 Hendrickson, 986 F.2d 990, the court expressly rejected the argument that the filing of a notice of forfeiture

established exclusive state jurisdiction. A notice of forfeiture had been filed by the state six days before the seizure was adopted by the federal government. The court held that the notice did not commence the civil action. It is the *complaint*, not the notice, that commences the separate civil *in rem* action, and by which the court acquires jurisdiction. That is especially true when, as here, "property may be proceeded against" administratively under state law "only if" its value is less than $100,000.

The evidence at the April 1 hearing conclusively established that the DEA adopted the seizure, took possession of the Currency, and initiated forfeiture proceedings well before the complaint was filed on March 20, 1998. Therefore, as in $12,390 and Madewell, exclusive federal jurisdiction attached first. "The fact that the government had taken possession of the Currency and initiated the requisite paperwork for administrative forfeiture is determinative...." *United States v. $12,390*, 956 F.2d 801 (8th Cir. 1992). *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995), is also on point:

> The decision in $12,390 therefore stands for at least two propositions. First, seizure of property pursuant to a state warrant does not establish exclusive state jurisdiction over the seized property preventing its voluntary transfer to federal authorities. [Citations omitted.] Second, only a state forfeiture action or comparable *in rem* proceeding for disposition of the property will preclude federal forfeiture jurisdiction, making a transfer of the property in question to federal control an affront to state court jurisdiction .... [Citation and footnote omitted].

Even if the notices could possibly be construed to have commenced a state forfeiture proceeding (despite the limiting jurisdictional amount and the failure to meet the requirements of a complaint), the federal adoption itself on March 7, 1998, deprived the state court of any possibility of acquiring jurisdiction over the *res*. A federal agency's adoption of a seizure has the same effect *as if the federal agency had originally seized the property on the date it was seized by the local authorities.* Madewell, 68 F.3d 1030 (citations omitted). The federal adoption is effective even if the person who initially seized the property lacked authority, or if initial seizure was constitutionally tainted. Id., *citing*, *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 325 (1926). Additionally, the federal adoption relates back to the time of the seizure, unlike state forfeitures, which means federal jurisdiction attached before even the Notices of Seizure were filed with the clerk. This is also consistent with 21 U.S.C. § 881(h), which provides that the United States acquires title to the property at the time the unlawful act giving rise to the seizure occurred.

In addition to the act of the adoption, federal jurisdiction attached with the commencement of federal administrative proceedings, which began either on the evening of March 7, 1998, when the DEA adopted the seizure, on March 10, 1998, when the DEA took physical possession, or, at the latest, on or before March 16, 1998, when the initial paperwork confirming the DEA administrative proceedings had been completed. Madewell; $12,390. AHP submits that the DEA proceedings commenced immediately upon the adoption of the seizure, and, unlike the state uncontested proceedings, there is no jurisdictional limit on DEA administrative proceedings when the *res* is United States currency. 21 C.F.R. §§ 1316.75, 1316.78. Under every possible rationale, whether using federal adoption, federal possession, or federal administrative proceedings, exclusive federal jurisdiction attached *before* a state action was initiated.

II. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE PROCEEDINGS BECAUSE OF THE FAILURE TO NAME OR SERVE THE NECESSARY PARTIES

The Currency has been in the possession, custody, and control of the DEA and United States Marshal since March 10, 1998. At the April 1 Hearing, the trial court even told the Deputy Prosecutor that the United States would have to be served even though it would probably result in removal. A. 227. The court found that the AHP did not have possession of the Currency and could not have complied with its March 18 order. The United States has been claiming jurisdiction over the *res* since March 7, 1998, yet the United States was never named or served. Furthermore, the DEA proceedings have been truncated and on July 27, 1998, a complaint for forfeiture of the $3,166,199 was filed in federal court, as the result of an ownership claim submitted to the DEA by the same Deputy Prosecutor. *See, Arkansas State Highway Comm'n v. Crittenden County Cir. Ct.*, No. 98-956, Exhibit A to Petition for Writ of Certiorari, or Alternatively, Prohibition or Mandamus (Aug. 5, 1998). The fact that the United States was a necessary party cannot be more clear. The state proceedings are obviously not binding on the United States and have no effect on its disposition of the Currency. Accordingly, the state proceedings were and are moot in the absence of the United States.

AHP was also never made a party to the proceedings, its only involvement resulting from the *ex parte* order which should have been quashed and vacated. Even now, no cause of action has ever been alleged against, or service had, on AHP, and the Deputy Prosecutor has consistently maintained that, despite obtaining the *ex parte* order, that AHP is *not* a party to the state proceedings. The findings of the trial court regarding AHP, particularly when considered in light of its conflicting

rulings about AHP's status in the proceedings (e.g., AHP is and is not a party, AHP is not a party but is bound by its findings, AHP is bound by the findings but has no standing to object to the proceedings), illustrate the basic unfairness of the proceedings and pose the danger that the findings will be argued against AHP in future proceedings. That would be patently unfair considering that not one single pleading has ever been filed in these proceedings alleging a cause of action against AHP or requesting relief against AHP. Because AHP was dragged into this quagmire only by virtue of an *ex parte* order entered *before a complaint had even been filed*, and AHP has *still* never been made a party or served, AHP has been denied even the opportunity to contest the issues in the correct venue.

The state court could not provide a remedy in these proceedings because the *res* was and is in federal custody and control. The federal proceedings will be binding on all of the parties and the *res* is within the jurisdiction of the federal court. Accordingly, the trial court's orders should be reversed and dismissed as moot. Allowing the trial court's orders to stand without the United States as a party leaves a distinct possibility of the federal and state courts reaching contradictory findings and conclusions of law, both of which would purport to be binding on AHP. See, *United States v. Winston-Salem/Forsyth County Bd. of Ed.*, 902 F. 2d 267 (4th Cir. 1990) (distribution of money returned by DEA to local police agency is governed by federal law, not state law).

III. THE TRIAL COURT ERRED IN FINDING THAT DEA'S ADMINISTRATIVE FORFEITURE PROCEEDINGS BEGIN ONLY WITH PUBLICATION OF NOTICE BECAUSE: (A) DEA PROCEEDINGS ARE SUMMARY IN NATURE AND COMMENCE THE MOMENT THE DEA MAKES, OR ADOPTS, A SEIZURE; (B) THE FINDING WAS MADE IN THE JULY 16, 1998, JUDGMENT, WHICH THE TRIAL COURT LACKED JURISDICTION TO RENDER; AND (C) THE RULING CITED NO AUTHORITY AND CONFLICTS WITH MADEWELL V. DOWNS

The trial court's finding that DEA administrative proceedings begin only with publication of notice was made in its July 16 Judgment. The finding cited no law, ignored Madewell and $12,390, and was made after the fact without authority. The circuit court also lacked jurisdiction to enter the July 16 Order because more than thirty (30) days had elapsed since AHP filed its Motion to Reconsider and Request for Specific Findings of Fact and Conclusions of Law following the May 8 Order, and AHP had appealed. *See, infra*; *Arkansas State Highway Comm'n v. Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992).

DEA administrative proceedings are summary in nature. Several steps in the administrative process precede the notice, such as reporting the seizure and appraising the property, see 21 C.F.R. §§ 1316.71 - 1316.81, and the initial paperwork. Madewell. The CFR provisions make clear that, while notice is a required step in the administrative proceeding, other steps are required in the process and take place before the notice is published. The import of the provisions is that federal

jurisdiction attaches and the administrative proceedings begin at the moment the *res* is seized by federal agents. Madewell (*adoption and **initiation** of paperwork* determines exclusive federal jurisdiction). The state's uncontested proceedings contain no similar provisions. Adoption or seizure, not notice, commences the federal administrative proceedings. Federal jurisdiction attaches *before* notice is published. Id. This is consistent with the doctrine of the relation back of the adoptive seizure, and the separate doctrine of relation back of the title under 21 U.S.C. § 881(h).

IV. THE TRIAL COURT ERRED IN ATTEMPTING TO EXERCISE JURISDICTION OVER AND MAKING FINDINGS PURPORTEDLY BINDING ON AHP BECAUSE:

A. NO PLEADING STATING FACTS OR REQUESTING RELIEF FROM AHP WAS EVER FILED WITH THE COURT

The circuit court lacked jurisdiction to enter any order or make any findings binding upon the AHP. *State v. Pulaski County Circuit Court*, 327 Ark. 287, 938 S.W.2d 815 (1997) (*Pet. for Reh'g granted*). The court lacked jurisdiction to act in the absence of a request for relief, and it is undisputed that no cause of action was ever alleged against AHP. Nevertheless, the court entered the *ex parte* order, continued to enter orders making erroneous findings and rulings, and attempted to make them binding on AHP.

B. AHP HAS NEVER BEEN SERVED WITH PROCESS OR ANY PLEADING REQUESTING SUCH RELIEF

AHP has never been served with process and was not a party. AHP would not even be here if the trial court had quashed

the March 18 order, ruled that AHP was not a party, and left it at that. But the trial court instead refused to vacate the *ex parte* order, refused to dismiss AHP, refused to require the Deputy Prosecutor to name or serve the United States and the AHP, and then ruled that AHP is bound by numerous erroneous findings and rulings. AHP has been forced to appeal out of caution. If the trial court had not tried to bind AHP, the state proceedings would be a nullity as far as AHP is concerned, and the federal proceedings would fully adjudicate all of the issues without the risk of contradictory findings. That is because, once again, *the United States was never made a party*, so it is not bound by the state proceedings even though the *res* is in its custody and control. The prejudice to AHP is again demonstrated by the fact that the Deputy Prosecutor argued that AHP was not properly before the court, yet AHP has continued to be subjected to the trial court's orders without notice of the reasoning for them, which is supposed be afforded by pleadings. AHP submits, as respectfully as possible, that the orders entered throughout the proceedings, including the factual findings, have changed solely to avoid the conclusive legal authorities offered by the AHP. AHP has been forced to play blind man's bluff, with the court's decisions turning on erroneous findings and legal arguments, often after the fact or never argued by the Deputy Prosecutor. Because of the absence of jurisdiction, parties, service, and venue, AHP respectfully submits that the trial court's findings, rulings, and orders regarding AHP are void. *See*, In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990).

C. AHP IS IMMUNE

AHP is immune. Ark. Const. art. 5, § 20. Because immunity is jurisdictional, *Newton v. Etoch*, 332 Ark. 325, ___ S.W.2d ___ (1998); *Cross v. Ark. Livestock & Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997), the circuit court lacked jurisdiction over AHP and its rulings and findings are not binding

on AHP. AHP's immunity was never waived, nor was it even contested by the Deputy Prosecutor.

D. VENUE IN ACTIONS AGAINST AHP LIES IN PULASKI COUNTY

Similarly, venue for any cause of action against the AHP lies in Pulaski County. Ark. Code Ann. § 27-65-134 (Repl. 1994); *Arkansas Highway Commission v. Holt*, 190 Ark. 868, 81 S.W.2d 929 (1935). The improper nature proceedings below, if allowed to stand, will have denied AHP its statutory right to contest the proceedings, filings, and rulings in the proper venue of Pulaski County.

V. THE TRIAL COURT ERRED IN HOLDING THAT ITS RULINGS AND FINDINGS WERE BINDING ON AHP WHILE ALSO RULING THAT AHP HAD NO STANDING OR AUTHORITY TO OBJECT TO THE PROCEEDINGS

The trial court at different times found that AHP was and was not a party. However, the court consistently held that AHP lacked standing or authority to object to the state proceedings. If AHP lacked standing to participate or argue in the proceedings, then it could not be considered a party, and the court's rulings and findings cannot be considered binding because there was no opportunity for AHP to contest them. The sole purpose of the proceedings has been to bootstrap the findings and rulings into some as yet unfiled future proceeding, or the federal proceeding. Because of the jurisdictional and other deficiencies and the absence of the United States as a party, the circuit court's orders are improper advisory opinions, but they purport to be binding. The court lacked jurisdiction to make its findings and rulings prospectively binding on AHP. *See, Arkansas Louisiana Gas Co. v. Taylor*, 314 Ark. 62, 858 S.W.2d

88 (1993) (element of *res judicata* is that both suits involve the same claim or a cause of action which was or could have been litigated). *See also, Dep't of Human Svcs. v. Crunkleton*, 303 Ark. 21, 791 S.W.2d 704 (1990) (not having been a party, state is not bound by judgment entered against one of its departments). If AHP lacked standing to object, that confirms AHP's contention that it was not a party (particularly in light of the Deputy Prosecutor's argument/agreement that AHP was not properly before the court) and the circuit court's rulings and finding purporting to bind AHP are void. *See*, In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990).

VI. THE TRIAL COURT ERRED IN FAILING TO QUASH OR VACATE THE *EX PARTE* MARCH 18, 1998 ORDER

The confused posture of this case stems from the entry of an *ex parte* order directing a state agency to pay $3,166,199 to the county prosecutor, with no complaint having even been filed regarding the *res*, with no complaint or pleading making any allegations against AHP, no verification or supporting affidavit, no notice, no service, and *no* compliance with Ark. R. Civ. P. 65. The *ex parte* order cannot be viewed simply as an erroneous turnover order because it was not rendered in the criminal proceedings, no complaint had even been filed in the civil proceedings, and the order directed AHP to *deposit* the currency, making it fungible, and *wire* the money to the Deputy Prosecutor. It was also not vacated or quashed. AHP respectfully submits that the *ex parte* nature of the order here is even more egregious than the circumstances in *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). At least in Jones, there were pleadings and a pending action providing *some* basis for the orders to which the opposing party could respond. Here, there was nothing. Even now, the Deputy Prosecutor has never offered any justification for an attorney obtaining an *ex parte* order in a civil proceeding directing a state agency to pay $3,166,199 to a

local entity, particularly when it is considered that there was no complaint filed vesting the court with any jurisdiction to act. *See, State v. Pulaski County Circuit Court*, 327 Ark. 287, 938 S.W.2d 815 (1997) (*Pet. for reh'g granted*). The March 18 order should have been quashed or vacated. At the time, there were no proceedings from which AHP could be dismissed, but AHP should never have been dragged into the subsequent proceedings in the absence of a cause of action or service of process. Accordingly, the circuit court erred in refusing to vacate the order.

VII. THE TRIAL COURT ERRED IN FINDING THE CRITTENDEN COUNTY PROSECUTING ATTORNEY'S OFFICE TO BE THE "SEIZING AGENCY" INSTEAD OF THE AHP

"[O]n March 7, 1998, [$3,166,199] in U.S. Currency was seized for violation of Arkansas Code Annotated § 5-64-505 *by the Arkansas Highway Police* in Crittenden County, Arkansas." Order at 1 (March 18, 1998) (emphasis added). A. 29. "NOTICE IS HEREBY GIVEN that on March 7, 1998, the [$3,166,199] was seized in Crittenden County, Arkansas, *by the Arkansas Highway Police* for violation of A.C.A. § 5-64-505." Notice of Pending Forfeiture at 1 (March 20, 1998) (emphasis added). A. 36. Although the precedent and notice were drafted and presented by the Deputy Prosecutor, he has since argued that the Crittenden County Prosecuting Attorney's Office is the seizing agency and the court changed its finding to reflect that the Crittenden County Prosecuting Attorney's Office was the seizing agency. As a matter of law, the finding defies law, fact, reason, and the plain meaning of the word "seizure." The argument that AHP is not the seizing agency was trumped up to muddy an unarguable conclusion, and is illustrative of the Deputy Prosecutor's chameleon-like efforts

to play fast and loose with the courts and the facts. *Monterey Development v. Lawyer's Title Ins.*, 4 F.3d 605 (8th Cir. 1993).

At the April 1 hearing, the trial court said that it had no doubt that AHP was clearly the seizing agency. A. 172. The subsequent change in the findings in the May 8 and July 16 orders to reflect that the Prosecuting Attorney's Office was the seizing agency was contrary to every item of evidence presented, including that presented by the Deputy Prosecutor, and defies the plain meaning of the word "seizure." The subsequent finding also conflicts with the plain language of Ark. Code Ann. §§ 5-64-501 & 5-64-505(b), which provided Officer Smith with the authority to make the seizure, and contemplates warrantless seizures without *any* involvement by the prosecuting attorney. The cavalier treatment of the facts amplifies the prejudice suffered by AHP by virtue of the many irregularities in the proceedings.

There cannot be a seizure without possession and the unrefuted evidence conclusively demonstrated that Prosecuting Attorney's Office never had possession of the Currency at *any time* (as it implicitly admitted by obtaining the March 18 order). The unrefuted evidence showed that AHP Officer Smith seized the Currency when Zamarripa was arrested. A. 168. No one would have been free to take the Currency and leave. A "seizure" is "[t]he act of taking possession of property, *e.g.*, for a violation of law or by virtue of an execution of a judgment. The term implies a taking or removal of something from the possession, actual or constructive, of another person or persons." Black's Law Dictionary 1359 (6th ed. 1990). Officer Smith arrested Mr. Zamarripa and *took* the Currency *from the possession of* Zamarripa, as conceded by both the Court and the Deputy Prosecutor. That was the seizure.

The Deputy Prosecutor *never* even possessed the Currency, and the argument is simply bizarre coming from the

Prosecuting Attorney's Office when it is supposed to be pursuing a parallel criminal action. The prosecutor would be, not just a link but the entire chain of custody, and disqualified from representing the state in the criminal proceedings. *Every receipt* and every bit of testimony presented, *by both AHP and the Deputy Prosecutor*, confirmed that the Currency was in the possession and control of the AHP from the time it was found. *The Deputy Prosecutor alleged that AHP was the seizing agency* (until after AHP provided the legal authority that determines this case). Upon delivering the Currency to the bank, the AHP issued the receipt to the bank on an AHP form. A. 228 (State's Exhibit 1). The Currency was returned to the AHP on Monday, March 9, 1998. The Deputy Prosecutor was not present when the money was counted on Sunday, March 8, 1998. After the AHP removed the Currency from the bank on March 9, it remained in the custody and control of the AHP until the DEA took possession the next day. There is not a *scintilla* of evidence that the Deputy Prosecutor, Mr. Hale, III, the Crittenden County Sheriff, or any of their agents possessed the Currency. Ever. The Currency was not deposited into the Deputy Prosecutor's account, which was at the very same bank. At no time did the court issue any order regarding the Currency — even in the criminal proceeding (which an is *in personam* action and would not have established jurisdiction over the *res*, anyhow). If the Deputy Prosecutor's argument and the court's findings are correct, then AHP must have robbed either the bank or the Deputy Prosecutor of over $3 Million. The Deputy Prosecutor conceded at the April 1 hearing that the seizing agency had the authority to determine whether the forfeiture should be state or federal. A. 180.

The notion of seizure without possession defies law, fact, reason, and the plain meaning of the word. The Deputy Prosecutor *avoided* being the "seizing agency" in order to stay *out* of the chain of custody, and his own testimony was that he arrived over two hours after the stop, after the search, after the

arrest, after the station had been closed, after the money had been removed from the truck and placed in the AHP office, and after the area had been cordoned off and access restricted, and left before the Currency was transported to the bank. A. 169-174, 214-215.

The Deputy Prosecutor's definition of "seizing agency" makes the prosecuting attorney's office the entire "chain" in every "chain of custody." If so, then the prosecuting attorney's office could *never* handle another criminal prosecution because it would be disqualified whenever *any* of the evidence *might* be subject to forfeiture. A prosecuting attorney is the state's *attorney*, not a law enforcement officer or agency. There was no evidence presented that either of the Hales are certified law enforcement officers. Prosecuting attorneys do not execute warrants and have no power to make arrests beyond that of any other citizen. Ark. Code Ann. § 16-21-147(b)(2). Prosecuting attorneys must be specially designated by statute as law enforcement officers in order to use some types of equipment. Ark. Code Ann. § 16-21-147(b)(1). In the absence of that authorization, prosecuting attorneys would not be able to lawfully use such equipment. Why? Because prosecuting attorneys are *not* law enforcement officers.

Arkansas law treats "law enforcement officers" and "law enforcement agencies" as completely different entities from "prosecuting attorneys" or "state's attorneys." Officer Smith was authorized to make the seizure, Ark. Code Ann. § 5-64-501, and did so during a warrantless search (which is clearly contemplated Ark. Code Ann. § 5-64-505(b)'s language about "seizure without process"). He made the arrest and the Consent to Search Form is an AHP form. Superintending control over the AHP is given to the Arkansas State Highway & Transportation Department and the Arkansas State Highway Commission, not the Deputy Prosecutor. The *res* remained in the custody and control of the AHP, in fact and by law, from the

time it was seized until it was delivered to the DEA according to all testimony and every receipt. A. 175, 228.

The plain language of Ark. Code Ann. § 5-64-505(d) specifically refers to "seizing law enforcement agency," not simply "seizing agency." The statute uses "law enforcement agency" to mean a police department or sheriff's department and uses the terms of "state's attorney," "attorney for the state," "prosecutor," or "prosecuting attorney" when referring to the prosecuting attorney's office. Prosecuting attorneys and law enforcement agencies have different powers, duties, and functions, and they are not the same. A prosecuting attorney is the attorney, not the investigating officer. AHP is a "law enforcement agency," the Crittenden County Prosecuting Attorney's Office is not. The difference is clearly recognized by the language of (1) Section 5-64-505(k)(i), which mentions "law enforcement agency or attorney for the state" in the alternative, and (2) § 5-64-505(n)(4), which mentions the "prosecuting attorney or any law enforcement officer" in the alternative. §5-64-505(d) deemed the Currency to be in the "custody of the director or seizing law enforcement agency." AHP possessed and controlled the Currency from the moment it was seized until the DEA took possession.

VIII. THE TRIAL COURT ERRED IN REVIEWING AHP'S DECISION TO CONTACT FEDERAL LAW ENFORCEMENT AGENCIES AND FINDING THAT AHP VIOLATED ARK. CODE ANN. § 5-64-505 BY CONTACTING AND COOPERATING WITH FEDERAL LAW ENFORCEMENT AGENCIES, BECAUSE:

A. SUCH REVIEW VIOLATED THE SEPARATION OF POWERS DOCTRINE

Nothing prohibits AHP from requesting federal help and forfeiture. AHP's decisions to contact federal authorities, request federal adoption and forfeiture proceedings, and pose no objection to the DEA's adoption, were discretionary executive decisions. "The seizing agency has authority to say where the money goes." James C. Hale, III, A. 180. While AHP never denied that the $250,000 state cap was *one* of several reasons for pursuing federal forfeiture, the other reasons more than adequately justify referral of this seizure to federal authorities, as well as all seizures made in Crittenden County in the future, regardless of size.

The circuit court lacked jurisdiction to second-guess AHP's decision to call federal authorities and permit adoption of the seizure under the separation of powers doctrine. Ark. Const. art. 4. AHP, a division of the Highway Department, is ultimately under the control of the Highway Commission, a state agency whose duties include executive functions, like the investigative decisions at issue. Ark. Const. amend. 42; *Arkansas Motor Carriers Ass'n Inc. v. Pritchett*, 303 Ark. 620, 798 S.W.2d 918 (1990). AHP is also charged with regulatory-type functions (possibly considered legislative) in regulating transportation and motor carriers in the State, which stems in large part from federal law. The court's orders declare it unlawful for AHP to cooperate with federal law enforcement agencies or even advise them of apparent violations of federal law. As such, the orders infringe on the executive discretion (if not federal criminal statutes) - *and duty* - to investigate and report violations of law to federal agencies when appropriate. The supervision of investigations and communications between various law enforcement officials is not a judicial function. Arkansas law encourages cooperation between federal and state law enforcement officers, as evidenced by the fact that federal officers are expressly given the same

authority as state law enforcement officers. Ark. Code Ann. § 16-81-106. Arkansas law also contemplates the use of federal forfeiture procedures. For example, Ark. Code Ann. § 16-21-147(d) provides that "[a]ll federal forfeitures to a prosecuting attorney's office shall be deposited in the drug control fund."

AHP, as a state-wide law enforcement agency deemed to be in control of the *res*, was vested with discretion to transport the *res* out of Crittenden County, and could have requested the Pulaski County Prosecuting Attorney to institute a state forfeiture action. *See, Leach v. Cook*, 211 Ark. 763, 202 S.W.2d 359 (1947). Conclusive authority for the federal adoption is found in the 200+ years of federal law surrounding the adoptive seizure doctrine. See, Madewell, and the cases cited therein.

AHP's candor regarding consideration of the $250,000 cap stands in stark contrast to the Deputy Prosecutor's, but there were and are many other compelling federal and state interests justifying, if not mandating, turning the matter over to federal authorities. Federal interest reasons for federal handling of the forfeiture include: (1) the motor vehicle was in interstate commerce when it was stopped by AHP; (2) the stop was initially for an administrative-type inspection authorized by both state and federal law (federal authorization possibly being necessary to avoid Commerce Clause questions); (3) some counterfeit currency was found and counterfeiting is clearly an exclusively federal interest; (4) the only felony charge filed in state court was for money-laundering (which is *not* one of the statutory grounds for civil forfeiture under state law) and money-laundering has traditionally been primarily a federal interest; (5) the sheer size of the seizure; and, most importantly, (6) the incident requires a multi-state investigation of other possible crimes and persons, clearly the province of federal authorities.

There are also compelling state interests. No guidelines exist for the distribution of forfeited assets in the state system,

and there is little oversight or control over assets forfeited. Section 5-64-505 requires periodic reports by law enforcement agencies and provides for Legislative Audit to audit the drug asset accounts, but there are few controls over the daily disbursement of funds by the Deputy Prosecutor. There are no provisions for control or oversight of any funds after they are disbursed from the drug asset account. Simply put, putting $3,166,199 in cash into an account under the control of one individual with no current and on-going oversight and control would be foolish.

The federal system has much more oversight, such as requiring more than one signature for the disbursement of funds, the absence of the family ties in the handling of the funds, and the presence of full-time United States Attorneys and Assistant United States Attorneys handling the forfeitures. The Department of Justice also has guidelines regarding the distribution *and use* of forfeited assets. It is very much preferable for 20 percent of the forfeiture to be paid to the DEA, a public agency acting for the benefit of all U.S. taxpayers (even those in Arkansas) in handling the lion's share of the multi-state investigation, than to turn $3,166,199 in cash over to the Deputy Prosecutor, paying him 15 percent. Not only was AHP's cooperation with federal authorities appropriate, it would have been poor stewardship and imprudent not to do so under the present circumstances. The $250,000 cap was aimed at local officials and drug task forces, not state-wide agencies and federal authorities.

Even though the state forfeiture proceeding is styled in the name of the State of Arkansas, the real plaintiff in interest in all forfeiture proceedings in Crittenden County, including this one, is the Crittenden County Prosecuting Attorney's Office, not the State. A. 114-129. Even a brief glance at the exhibits clearly reveals that a significant conflict of interest on the part of the Deputy Prosecutor. Every forfeiture order has forfeited

the *res* to the "Crittenden County Prosecuting Attorney's Office," and not the State of Arkansas. Only the interest of one office in one county has been represented - certainly not the interests of taxpayers in 74 other counties. This is particularly evidenced by the statements, and apparent finding, at the April 1 hearing that no one (including the Circuit Judge, formerly the Prosecuting Attorney for the Second Judicial District) was aware of any proceeds ever having been forwarded to the State Police fund, yet the Deputy Prosecutor had prosecuted a forfeiture of over $450,000 in 1997, half of which was creatively and erroneously structured to avoid operation of the $250,000 cap. A. 114-115. The exhibits raise other questions.

The Crittenden County Prosecuting Attorney's Office has also routinely, but improperly, used the uncontested proceedings of Section § 5-64-509 to forfeit assets greater than $100,000 in value. In fact, that is what the office tried to do here. In addition, while not necessarily unlawful in itself, the fact that the Deputy Prosecutor's son handles all state forfeitures in Crittenden County adds to the appearance of impropriety under the circumstances presented. The potential liability under federal law is sufficient reason alone for referring the matter to the federal authorities. *E.g.*, 42 U.S.C. § 1983; 18 U.S.C. §§ 1961-1968.

B. THE CURRENCY WAS IN THE CUSTODY AND CONTROL OF THE AHP PURSUANT TO ARK. CODE ANN. § 5-64-505(d), AND THE PROSECUTING ATTORNEY'S CONSENT WAS NOT REQUIRED FOR FEDERAL ADOPTION

As discussed *supra*, the Currency was in the custody and control of the AHP as a matter of law. Section 5-64-505 contains no language indicating that the Prosecuting Attorney's consent was necessary. Although AHP maintains that the Deputy Prosecutor expressed his agreement to the federal

proceedings to Capt. McLean, Mr. Wharton, and Mr. Gibson, which is further evidenced by the transportation of the currency to Little Rock, the Deputy Prosecutor's consent was not required by any language contained in Section 5-64-505.

C. A COURT ORDER WAS NOT REQUIRED BECAUSE THE STATE COURT HAD NOT ACQUIRED JURISDICTION BECAUSE STATE PROCEEDINGS WERE NOT COMMENCED UNTIL MARCH 20, 1998, WHEN THE COMPLAINT WAS FILED

The court's finding that AHP violated Section 5-64-505 by not seeking a court order also fails to point to any language in the statute requiring an order when the court had not acquired jurisdiction. When the DEA took possession of the Currency on March 10, 1998, the circuit court had not acquired jurisdiction because no complaint had been filed. In *Leach v. Cook*, 211 Ark. 763, 202 S.W.2d 359 (1947), it was similarly argued that the removal of the contraband to Pulaski County was wrongful. The court noted that although the statute referred to the court having jurisdiction over the contraband, this begged the question because the court in Chicot County had not established jurisdiction in the civil action. Here, because the circuit court had not established jurisdiction over the *res*, no order was required.

D. FEDERAL ADOPTION IS NOT DEPENDENT ON STATE LAW, AND THE DEA ADOPTION OF THE SEIZURE WOULD HAVE BEEN EFFECTIVE EVEN IF AHP HAD OBJECTED

Even if AHP and the Deputy Prosecutor had objected to the federal adoption it would still have been valid. Federal adoption is an act by the federal agency and not dependent on state law. This is again why the United States is a necessary party. The rulings and finding have no effect upon the entity

with possession and control of the *res*, and every issue will have to be fully litigated in the federal proceedings, where AHP fully expects the legal rulings and findings of fact to directly contradict those made by the circuit court.

IX. THE TRIAL COURT ERRED IN FINDING THAT THE CRITTENDEN COUNTY PROSECUTING ATTORNEY DID NOT AGREE TO, ACQUIESCE TO, OR WAIVE THE PURSUIT OF STATE FORFEITURE PROCEEDINGS, THE REMOVAL OF THE *RES* FROM THE STATE COURT'S JURISDICTION, AND THE PURSUIT OF FEDERAL FORFEITURE PROCEEDINGS

The affidavit in support of the improperly filed search warrant, the March 18 order, the receipts, the testimony of Capt. McLean and Mr. Wharton, and the affidavit of Mr. Gibson, reflect that the Deputy Prosecutor knowingly acquiesced to the removal of the *res* from Crittenden County to Pulaski County, regardless of credibility issues about whether there was a formal agreement. There was no dispute that the Deputy Prosecutor agreed to the removal of the *res* from Crittenden County, and the fact that the Deputy Prosecutor's testimony regarding the seizure and the Crime Lab is contradicted by his previous positions of record was never addressed by the trial court and should also be noted in evaluating his testimony that he did not express his agreement to federal proceedings.

X. THE TRIAL COURT ERRED IN ENTERING THE JULY 16, 1998, JUDGMENT BECAUSE MORE THAN THIRTY (30) DAYS HAD ELAPSED SINCE AHP FILED ITS MOTION TO RECONSIDER AND REQUEST FOR SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE MAY 8, 1998, ORDER

Most of the truly egregious and erroneous rulings and findings, which AHP must appeal out of caution, are contained in the trial court's Judgment entered on July 16, 1998. AHP respectfully submits that if the court was capable of entering a final order in light of the absence of the United States, the final order was the May 8 order. AHP timely filed its Motion for Reconsideration on May 18, 1998. The trial court did not act on the motion within 30 days and AHP filed a timely second notice of appeal from all orders entered by the trial court (and the constructive denial of its motion) on June 24, 1998. The trial court lacked jurisdiction to render the July 16 Judgment. *Arkansas State Highway Comm'n v. Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992). (A third notice of appeal was filed on July 22, 1998.)

As set out *supra and infra*, every paragraph, finding, and conclusion in the July 16 Judgment is erroneous except for the findings that (1) the AHP did not possess the money on March 18 could not comply with the court's order, and (2) AHP is not a party. With those exceptions, every finding and legal conclusion is clearly contrary to the evidence and procedural and substantive law. The court did not cite a single authority in support of any of its legal conclusions.

XI. THE TRIAL COURT ERRED IN DENYING AHP'S MOTION TO RECONSIDER AND REQUEST FOR SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

For all of the foregoing reasons, the trial court also erred in denying AHP's Motion to Reconsider and Request for Specific Findings of Fact and Conclusions of Law. AHP filed the motion because the trial court refused to quash and vacate its order or otherwise dismiss AHP or the proceedings for its lack of jurisdiction, and attempted to bind AHP to erroneous rulings and findings. As a practical matter, the state court proceedings are meaningless in the absence of the United States, but the specific erroneous findings made by the trial court can reasonably be expected to form the basis of attempts to secure additional orders from the circuit court or bar AHP from arguing them in other new proceedings. All of this stems from the wholly improper *ex parte* order entered on March 18. Even if the court wanted to make findings regarding its jurisdiction and the events surrounding the seizure, AHP should have been dismissed from the proceedings. AHP was entitled to have all issues relating to it determined after service, notice, and statement of a cause of action in a court of competent jurisdiction and correct venue.

A sworn and authorized DEA agent adopted the seizure on March 7, 1998, before the Deputy Prosecutor was even called. The Deputy Prosecutor alleged in his Notice of Pending Forfeiture, and the court ruled in its *ex parte* order, that AHP seized the Currency on March 7, 1998. The Currency was transported to AHP headquarters in Little Rock. The Deputy Prosecutor's testimony that he directed that the Currency be delivered to the Crime Lab can only (and very charitably) be described as fanciful, and is contradicted by the affidavit for the search warrant and the *ex parte* order, which were drafted by his office and attorney, respectively, not to mention the

testimony of AHP's officers and attorneys, the absence of any evidence of any inquiry to the Crime Lab about the Currency, the fact that the March 18 order was directed to AHP and not the Crime Lab (and the Deputy Prosecutor testified that he was surprised to learn on *March 20* that the Crime Lab did not have the money), the absence of any mention of the Crime Lab or allegation of misdelivery of the Currency until the April 1 hearing, the absurdity of testing one million bills when the photography and shake tests are the standard investigative methods, and the fact that the March 18 order directed that the money be deposited and wired, thus destroying the ability to test the bills had they still been in AHP's vault.

As already argued *supra*, the court's finding that the Prosecuting Attorney seized the Currency is not supported by a single receipt or other shred of evidence, and contradicts the evidence introduced by the Deputy Prosecutor, the Deputy Prosecutor's own pleadings, the court's own order and statement from the Bench, and the overwhelming evidence introduced by AHP. The finding is erroneous.

As already discussed *supra*, the trial court's conclusory finding that state proceedings were commenced (presumably on March 9) before the DEA adoption or institution of DEA administrative proceedings is also erroneous on the face of the record. Ark. R. Civ. P. 3; Madewell. The complaint was not filed until March 20 and the court could not have acquired jurisdiction until then. The finding that AHP lacks authority to contact federal authorities is also erroneous and usurps AHP's executive functions.

The court erred in failing to dismiss AHP because of the failure of the Deputy Prosecutor to name or serve AHP and AHP's constitutional immunity. The trial court erred in failing to vacate or quash the March 18 order pursuant to Rule 65 and dismiss AHP. The trial court erred in finding that AHP was a

party to the proceedings. *But see*, the July 16 Judgment. The trial court erred in denying AHP's motion to dismiss for venue. The trial court erred in shifting the burden of proof on the issue of its jurisdiction from the Deputy Prosecutor to AHP, particularly considering no facts were pled or proven showing the Currency within the reach of the court at the time the complaint was filed. The finding ignored the abundant and unrefuted evidence that the DEA had adopted the seizure and begun its administrative proceedings prior to the filing of the complaint. If the trial court possessed jurisdiction over the Currency, it should have been able to enter an order for the *res* to be deposited into the registry of the court.

The trial court erred in failing to dismiss the proceedings as moot in light of the Deputy Prosecutor's deliberate failure to serve or name the United States and especially erred in finding AHP's actions merely an effort to "circumvent" state law in light of the reasons and justifications warranting, if not mandating, federal involvement discussed *supra*.

CONCLUSION

On direct appeal, because of the mootness, absence of jurisdiction, and numerous errors set out above, AHP respectfully prays that the Court reverse the orders of the circuit court and dismiss this action, or at least reverse and remand with directions to dismiss AHP (although any rulings below regarding any of the parties will be moot in the absence of the United States). Alternatively, AHP requests that the Court issue a writ of certiorari, prohibition, or mandamus to the circuit court vacating its orders and quashing the state proceedings. Should the Court conclude that AHP is not entitled to appeal and that the writs are not the appropriate remedy, AHP respectfully prays that the Court clarify whether AHP, as a non-party is bound by the circuit court's rulings. AHP further prays for costs and all other just and proper relief that the Court may consider

appropriate from the Crittenden County Prosecuting Attorney's Office.

RESPECTFULLY SUBMITTED,
ARKANSAS HIGHWAY POLICE

IN THE SUPREME COURT OF ARKANSAS

In The Matter Of $3,166,199 Case No. 98-957

Arkansas Highway Police Appellant

v.

Crittenden County Prosecuting Attorney's Office;
Brent Davis, Prosecuting Attorney For
The Second Judicial District;
And State Of Arkansas, Nominal Plaintiff Below Appellees

Brief Of Appellee
Argument

Standing to appeal: This appeal concerns the appellant's dispute, as law-enforcement agency, with its prosecuting attorney's decision to pursue a civil forfeiture of more than $3.1 million through the state asset forfeiture system, rather than through the federal asset forfeiture system. Appellant has persistently argued that it never became a party to the *in rem* proceeding below (*E.g.*, R. 149), a proceeding brought by the State of Arkansas, through its prosecuting attorney, against the *res*. In fact, the appellant concedes as much in its notices of appeal (R. 215, 230, 231-E). Because the appellant was not a party below, it is not entitled to file a notice of appeal directly attacking any of the orders it seeks to challenge. *See Arkansas Dep't of Human Services v. Crunkleton*. 303 Ark. 21, 23, 791 S.W.2d 704, 705 (1990), *cited in Arkansas Dep't of Human*

Services v. Bailey, 318 Ark. 374, 377, 885 S.W.2d 677, 678-79 (1994). The appellant clearly was not a proper party below, and never intervened as a party; thus, it could not create a right to bring the underlying matters up for review simply by filing a motion to dismiss the proceeding, as it tried to do pursuant to ARK. R. CIV. P. 12 (R. 27-33, 44-60).

By its very terms, Rule 12 applies to parties in the action sought to be challenged thereunder. There is no provision whereby a non-party is entitled to file a motion seeking dismissal or relief from a judgment and thereby create some entitlement to attack on appeal the judgment it otherwise could not have attacked. Rather, to obtain standing to appeal, a non-party must either intervene in a civil action pursuant to Rule 24 of the ARKANSAS RULES OF CIVIL PROCEDURE, or file an appropriate, independent action challenging the objectionable proceeding, order, or judgment in order to attack it on appeal. *See, e.g.*, ARK. R. CIV. P. 24 (1998); *Haberman v. Lisle*, 318 Ark. 177, 180-81, 884 S.W.2d 262, 263-64 (1994) (substituted opinion on denial of rehearing, noting that non-party must intervene or file an independent action to challenge underlying matter on appeal). There is additional authority, which may allow a party to attack an order or judgment in a post-trial motion pursuant to ARK. R. CIV. P. 59 & 60 and thereby create a right to review. *See Arkansas Department of Human Services v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (Jun. 11, 1998). However, the appellant filed no post-trial motion pursuant to Rules 59 or 60. Further, Rule 24 requ*ires* that a formal motion to intervene be filed if one desi*res* to intervene in an action. ARK. R. CIV. P. 24(c) (1998). Because the appellant never intervened in the action below and never filed an independent action below challenging the lower court's proceeding or orders, the appellant is without standing to complain about the orders on appeal.

Appellant's reliance on *In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990), is misplaced. Forfeiture

procedures we designed to afford due process to owners and interest holders of property before their interest in the property is removed. The purpose of notice under forfeiture statutes is to allow an owner or interest holder to contest the forfeiture. A seizing law-enforcement agency's interest, on the other hand, is to see the property forfeited. Its interest is not to *contest* the forfeiture at all, but rather is dependent upon the forfeiture itself, and it cannot become an "interest holder" with some enforceable property interest until the property is, in fact, forfeited. Cf., e.g., *United States v. One Parcel of Land in Name of Mikell*, 33 F.3d 11 (5th Cir. 1994) (government does not have ownership interest in property until there is decree of forfeiture). An "interest" in the outcome of a forfeiture proceeding is not the type of "pecuniary interest" to which the holding in *Allen* applies. *Allen* involved an order, entered in a civil, involuntary commitment proceeding, requiring a state mental-health facility to incur a debt in the sum of $10,000.00. The facility "had no notice whatsoever that a judicial proceeding was being had against it." 304 Ark. at 223, 800 S.W.2d at 716.

Appellant stands in an entirely different posture than did the appellant in *Allen*. First, the exception identified in *Allen* has been applied only as a shield for those affected by what is in essence a monetary judgment entered against them without proper process. So far as the appellee can discern. the exception was not intended to serve as a sword by which a state agency may manipulate the state asset forfeiture system-at the expense of the state-in order to obtain, for itself, millions of dollars over and above that which state legislation would limit the agency. Second, appellant was not entirely without notice that a judicial forfeiture proceeding was being had. In fact, appellant fully attempted to challenge the proceeding below, although in a wholly inappropriate manner, without ever moving to intervene and without ever challenging the forfeiture orders "post-judgment" or collaterally.

Appellant's further asserts that it nevertheless complied with the procedure set forth in *Arkansas Department of Human Services v. R.P.*, 333 Ark. 516, 528-29, 970 S.W.2d 225, 231 (1998) for obtaining standing to appeal. Even assuming the procedure acknowledged in *R.P.* (a FINS case in which DHS was statutorily obligated to provide certain services) applied to the circumstances below (a civil, *in rem* forfeiture proceeding in which the appellant had no statutory onus), the appellant never filed a post-trial motion attacking the order or orders it seeks to challenge on appeal; rather, the appellant filed a substantive motion to dismiss pursuant to Ark. R. CIV. P. 12(b), a rule that can be invoked only by a party. *Cf. id.* (noting that DHS, when it filed its Rule 59 and Rule 60 motion, was not subject to time limits set forth in Ark. R. CIV. P. 59 & 60 because rules applied only to parties, and DHS was not a party when it filed its motion). Appellant is simply without standing to appeal. However, should this Court determine otherwise, appellant is not entitled to relief.

I. The Trial Court Possessed Jurisdiction Over The *Res*.

It is well settled that when state and federal authorities proceed against the same *res*, the authority first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. *E.g., Penn General Casualty Co. v. Commonwealth of Penn. Ex rel. Schnader*, 294 U.S. 189, 195 (1935). Relying on this principle, the appellant incorrectly asserts that the circuit court was without jurisdiction to forfeit the *res* because federal authorities acquired *in rem* jurisdiction before state authorities did. One significant problem with the appellant's argument is that it employs a double-standard-one that makes physical custody the standard for acquiring *federal in rem* jurisdiction and filing at the courthouse the standard for *state* acquisition of *in rem* jurisdiction. In arguing that the state court never possessed *in rem* jurisdiction to forfeit the *res*, appellant exclusively relies on three points:

that it made an unauthorized transfer of the *res* to federal authorities within three days of the seizure, that federal authorities "adopted" the state's seizure shortly after it was made,[1] and that the prosecuting attorney commenced forfeiture proceedings no earlier than March 9, 1998. Whether and when federal authorities adopted the seizure and took custody of the *res*, however, and when the prosecuting attorney commenced state forfeiture proceedings are all points irrelevant to the question of jurisdiction in this case because Arkansas's statutory forfeiture scheme vested jurisdiction in the state court from the inception of the seizure-before the unlawful transfer and before the federal "adoption."

Arkansas's statutory forfeiture scheme is a "turnover order" scheme -a scheme that is jurisdictional in nature as a *res*ult of Arkansas Code Annotated § 5-64-505(d). That is, any time a seizure is made by state authorities, the seized property is subject to the states jurisdiction, unless and until a state court of competent jurisdiction issues an order permitting the transfer of the property to a court of another jurisdiction or otherwise disposes of the property. *See* Steven L. Kessler, *Civil and Criminal Forfeitures Federal an State Practice*, § 3.01[2][g] (Clark, Boardman, & Callaghan 1997). The appellant *never* obtained such an order, as required by Ark. Code Ann. § 5-64-505(d), and its improper transfer of the *res* to federal authorities was ineffective to instill jurisdiction in the federal court. Even

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[1]The validity of appellant's argument that the adoption occurred on the night of the seizure, by a State Highway Department employee, is dubious. "The Federal Government should accept adoptive seizures only when there is a valid, good faith prosecutorial reason for doing so. The fact that forfeiture pursuant to state law may result in less of a monetary benefit for a local police agency is not such a reason. Moreover, before adopting a non-federal seizure and proceeding against the seized property, the government attorney and federal investigative agency must carefully assess the facts and circumstances upon which the original seizure was based," *Asset-forfeiture Law and Practice Manual*. 2-23 (Dep't of Justice June 1998).

assuming that the prosecuting attorney approved of the transfer-a point that is belied by the record[3]-the transfer was still improper and ineffective to oust the state court's *in rem* jurisdiction. Even the fact that a *state prosecutor* may decide not to pursue a state forfeiture proceeding does not divest the state court of jurisdiction over the *res*. Kessler, *Civil and Criminal Forfeitures Federal and State Practice*, § 3.01[2][g]. A turnover order is required:

> Also, the subsequent issuance of a [federal] *in rem* warrant does not remedy the initial unlawful transfer of property, the subsequent unlawful retention of the property, or the [federal] government's refusal to return the property. Without the statutorily required turnover order, the federal court is without jurisdiction.

Id. at 3-38.

Arkansas's forfeiture scheme provides, in pertinent part, as follows:

> Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the director or seizing law enforcement agency *subject only to the orders and decrees of the circuit court having jurisdiction over the property seized.*

Ark. Code Ann. § 5-64-505(d) (emphasis added).

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[3] Even appellant's employees testified that the deputy prosecuting attorney repeatedly noted that he would have to get the approval of the prosecuting attorney before agreeing to a federal forfeiture of the *res* (R. 293, 296-97). No one testified that approval was ever secured.

Thus, the relevant circuit court has exclusive control over the disposition of seized property. *Id. See also* Ark. R. Crim. P. 15.2 (return of seized property or disposition of unclaimed property subject to jurisdiction of circuit courts). Cases abound in which courts have held that when a state's statutory warrant, seizure, and forfeiture schemes similarly *res*trict the disposition of seized property, the statutory scheme is jurisdictional in nature and provides the state court with *in rem* jurisdiction upon seizure and until the court relinquishes its jurisdiction in a final disposition order regarding the seized property.

In *United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120, 122-23 (7th Cir. 1991). the Seventh Circuit Court of Appeals construed statutory language identical to that in Ark. Code Arm. § 5-64-505(d). The relevant Illinois statute provided that "[p]roperty taken or detained under this Section shall not be subject to replevin, but is deemed to be in the custody of the Director subject only to the order and judgments of the circuit court having jurisdiction over the forfeiture proceedings." *Id.* at 122. The Seventh Circuit squarely held that as a *res*ult of that language, the state's forfeiture scheme was a "'turnover order" scheme that vested the state with *in rem* jurisdiction as soon as local police seized the *res*. *Id.* at 122-23. Even though police transferred the *res* to federal authorities *before* state forfeiture proceedings were formally commenced, the transfer did not oust the state of *in rem* jurisdiction because the transfer did not comply with the state law. A turnover order was a prerequisite for the federal court to acquire *in rem* jurisdiction. *Accord United States v. One 1987 Mercedes Benz Roadster*, 2 F.3d 241, 242-43 (7th Cir. 1993).

In other words, "[i]n an *in rem* federal forfeiture proceeding, jurisdiction is obtained only when the *res* is properly under the control of the federal court." Kessler, *Civil and Criminal Forfeitures*, at 3-37 (emphasis added). Improper

transfers of property to federal authorities will not vest the federal court with jurisdiction. *See One 1987 Mercedes Benz Roadster*, 2 F.3d at 243-44, *One 1979 Chevrolet C-20 Van*, 924 F.2d at 123 (citing *United States v. $79,123.49 in U.S. Cash and Currency*, 830 F.2d 94, 98 (7th Cir. 1987) for proposition that "jurisdiction obtained by mere possession 'goes much too far[,]" and '[p]ossession obtained through an invalid seizure neither strips the first court of jurisdiction nor vests it in the second'"); *Scarabin v. Drug Enforcement Administration*, 966 F.2d 989, 993-94 (5th Cir. 1992) (noting that even if state law enforcement agency had transferred *res* to physical custody of DEA, state court first had exclusive control over the *res* by virtue of its seizure and its law that restricted all seized property to the state court's control); *United States v. $490,920 in United States Currency*. 911 F.Supp. 720, 725-26 (S.D.N.Y. 1996) (New York's property-seizure scheme deemed jurisdictional because it vests state court with exclusive control over seized property; thus, state court retained jurisdiction over the *res* until state and federal authorities fully complied with the state court's order directing the return of the property.), *See also Johnson v. Johnson*, 849 P.2d 1361, 1363-65 (Ak. 1993)(state law enforcement agency's unilateral transfer of seized property to DEA, and DEA's subsequent adoption, did not oust the state of its *in rem* jurisdiction, even though the state never instituted forfeiture proceedings; transfer was an unlawful conversion).

In such "turnover order" jurisdictions, it is not the formal commencement of forfeiture proceedings that vests a state court with jurisdiction. *E.g., Scarabin v. Drug Enforcement Administration*, 966 F.2d at 994 (expressly rejecting the notion that "a state court may acquire *in rem* jurisdiction only through [the] ... commencement of forfeiture proceedings in that court.") Rather, *in rem* jurisdiction is acquired at the time of seizure and cannot be defeated by an unsanctioned transfer of the *res* by local police to federal authorities. *Id.* at 993. In short, the question of jurisdiction over the *res* is determined by reference

to the state' s forfeiture law, *see* Kessler, Civil and Criminal Forfeitures, § 3.01[2][g], and therein lies the principal distinction between this case and the three cases on which the appellant's jurisdictional argument is premised: *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995), *United States v. Certain Real Property*, 986 F.2d 990 (6th Cir. 1993), and *United States v. $12,390.00*, 956 F.2d 801 (8th Cir. 1992).

Appellant principally relies upon *Madewell v. Downs*, a case which squarely cuts against appellant. In *Madewell*, the Eighth Circuit plainly acknowledged *Scarabin* and *C-20 Van* and the effect of the jurisdictional statutory schemes in those cases. In fact, the court indicated that its decision would have been different had the case arisen under Missouri's then-current jurisdictional statutory scheme, but that scheme was not in effect at the time of the events underlying the court's opinion. "Although Missouri now has a statute specifically requiring a turnover order from the court before transfer of property to federal control, it did not have such a statute at the time of the events in question here." *Madewell*, 68 F.3d at 1042-43.

Moreover, the court specifically did not approve of unauthorized transfers between state and federal agencies to avoid the effects of state law:

> Although this court would not suggest that a late federal adoption of a seizure and actual transfer of the property to federal control could or should be used to avoid the effects of proper state court proceedings concerning the seized property after its seizure by state or local officials and before federal adoption,... the [adoption] doctrine does suggest that the claimant of such property, has no due process complaint about the adoption itself.

Id. at 1039.

The same is true of *United States v. $12,390.00*, 956 F.2d 801 (8th Cir. 1992), in which the Eighth Circuit clearly noted that the "transfer" of in rent jurisdiction from state court to federal court is dependent upon an authorized transfer of the *res*. Unauthorized transfers from one jurisdiction to another will not divest the former of its jurisdiction over the *res*. *Id.* at 803-05. In other words, law enforcement agents cannot deprive a state court of jurisdiction over a *res* merely by absconding with the *res*. *Id.* As in *Madewell*, it was significant in *$12.390.00* that Missouri law did not require a turnover order, and it was significant to the Court that the transfer was voluntary and that *no state forfeiture proceedings were ever intended or begun*. *Id.*. at 805, 806 n.4. The state court did not even consider that my affront to its jurisdiction had occurred, Id. at 806. The Eighth Circuit clearly noted, however, that the state court had the power to order the law enforcement agency to pay over the equivalent sum of money that it had wrongfully converted by the unauthorized transfer, in spite of the federal forfeiture. *Id.* at 805-06.

Finally, *United States v. Certain Real Property*, 986 F.2d 990 (6th Cir. 1 993), has been criticized for its complete failure to analyze whether Michigan forfeiture law contains a jurisdictional turnover-order requirement. *See United States v. $490,920.00*, 911 F.Supp, at 728. Even federal guidelines caution that:

> Care must be taken in accepting any "adoptive" seizure to ensure that there are no state law impediments to the exercise of *in rem* jurisdiction. ...[A] few federal courts have recently focused on restrictions on transfers imposed by state law. Such restrictions require that a court order be obtained before seized property may be transferred or otherwise disposed of by state authorities. These courts

> have held that federal authorities never acquire jurisdiction over property seized nod transferred in violation of such provisions. ... [W]here an "adoptive" seizure is undertaken and a state law impediment to the exercise of federal *in rem* jurisdiction is discovered after the property has been accepted for federal forfeiture, it should be possible to alleviate the problem simply by yielding to the state authorities until the impediment is eliminated and then "re-sizing" the property for federal forfeiture, if such action is still necessary.

Asset Forfeiture Law and Practice Manual, 2-21 - 2-22 (Dep't of Justice June 1998). The appellant's unlawful transfer of the *res* to federal authorities, whether with or without prosecutorial assent, was insufficient to oust the state court of its jurisdiction over the *res*; thus, appellant's argument must fail.

II. The Trial Court Was Not Required To Dismiss The Civil Forfeiture Proceeding Below For Failure To Name The United States Or Arkansas Highway Police As Parties.

The appellant argues that the trial court erred in refusing to dismiss the proceedings on the basis that the state did not name the appellant or the United States as parties to the civil forfeiture action against the *res*. Appellant cites no authority in support of its argument that the United States, by virtue of its improper possession of the *res*, became a necessary party, and appellant cites no authority for its argument that the action should have been *dismissed* for failure to join the United States as a party. Appellant further cites no authority for the proposition that the appellant should have been joined as a necessary party. Thus, this point should he rejected for failure to cite any

convincing authority. *See, e.g., McClendon v. State*, 316 Ark. 688, 693, 875 S.W.2d 55, 58 (1994) (court will not consider arguments unsupported by convincing authority).

Moreover, appellant simply reasserts its faulty argument that because it unlawfully transferred the money to federal authorities, the federal government possessed *jurisdiction* of the *res* and was, therefore, a necessary party below. Appellant's Opening Brief, at 236, 237. For reasons previously noted, the federal government did not possess jurisdiction over the *res*. Even assuming, solely for the sake of argument, that the United States was a necessary party simply by virtue of its possession of the *res*, dismissal was not the appropriate remedy. *See, e.g., Britton v. City of Conway*, 36 Ark. App. 32, 821 S.W.2d 65 (1991) (dismissal not appropriate remedy for failure to join necessary party). Thus, the appellant's argument to the contrary must fail.

Finally, the same result must ensue regarding appellant's argument that it should have been joined as a party. Dismissal was not an appropriate remedy, even assuming appellant was a necessary party-a point that the appellee disputes. Forfeiture procedures are designed to afford due process to *owners and interest holders* of property before their interest in the properly is removed. The purpose of notice under forfeiture statutes is to allow an owner or interest holder to contest the forfeiture. The seizing law enforcement agency's interest, on the other hand, is to see the property forfeited. Its "financial stake" in the property is dependent upon the forfeiture itself, and it cannot become an "interest holder" with some enforceable property interest until the property is, in fact, forfeited. *Cf., e.g., United States v. One Parcel of Land in Name of Mikell*, 33 F.3d 11 (5th Cir. 1994) (government does not have ownership interest in properly until there is decree of forfeiture); *Hope Developers, Inc. v. Vandiver*, 665 So. 2d 910 (Ala. 1995) (vesting of title to forfeited property in federal government retroactively upon

commission of act giving rise to forfeiture is not self-executing under 21 U.S.C. §881(h); vesting of title occurs only after government has won judgment of forfeiture; until final judgment of forfeiture, someone else owns property and may invoke any available defense). *See also* 37 Haw. Penal Code § 712A-1 (defining "interest holder" as person in whose favor there is a security interest or who is the beneficiary of a perfected encumbrance pertaining to an interest in property"). The appellant had no grounds to contest the forfeiture and, indeed, was subject to the circuit court's orders regarding the custody and movement of the *res*. Ark. Code Ann, § 5-64-505(d). *See also* Ark. R. Crim. P. 15.2. Thus, dismissal was not required.

III. When Federal Administrative Forfeiture Proceedings Commenced Is Irrelevant To The Question Of Jurisdiction In This Case.

Appellant apparently attempts to reassert its first point by arguing that federal jurisdiction attached when the purported "adoption" of the seizure occurred on March 7, 1998. For reasons noted previously under Point I, it is irrelevant when federal forfeiture proceedings began because the state obtained *in rem* jurisdiction immediately upon seizure. Ark. Code Ann. § 5-64-505(d). The appellee will not reiterate its argument, except to note that it is questionable whether a state employee could have adopted the seizure for the federal government in the manner appellant claims he did (R. 38-39), especially in light of the Department of Justice's warning that "before adopting a non-federal seizure and proceeding against the seized property, *the government attorney and federal investigative agency must carefully assess the facts and circumstances upon which the original seizure was based." Asset Forfeiture Law and Practice Manual*, 2-23 (June 1998) (emphasis added). *See also Floyd v. United States*, 860 F.2d 999, 1008 (10th Cir. 1988) ("[W]e cannot agree with the government that a forfeiture was in any meaningful sense instituted on September 21, 1987, when

agent Canty merely forwarded papers to Washington. The administrative forfeiture mechanism begins with the publication of notice.")

IV. The Appellant Is Not Above The Circuit Court's Statutory Power To Control The Custody And Disposition Of Property Seized In Connection With A Crime And Subject To Civil Forfeiture.

A & B: No lawsuit filed against appellant: Again, the appellant assumes that the circuit court was without power to issue any orders affecting appellant, unless appellant was first made a party to the civil forfeiture action. For reasons already noted in response to Point II, appellant was not a party and did not have to be joined as a party to be bound by the circuit court's orders respecting the seized property. Arkansas law clearly gives the circuit court the power to control the custody and disposition of property seized by law enforcement agencies without making the agencies parties to a criminal proceeding, a civil forfeiture proceeding, or any other proceeding. Ark. Code. Ann. § 5-64-505; Ark. R. Crim. P. 15.2. *Cf. R.P.*, 333 Ark. at 528-29, 970 S.W.2d at 231 (DHS not a party to FINS proceeding but obligated to obey court's order that it provide services in connection therewith). It is unreasonable to suggest that every time a court issues a disposition or forfeiture order in a criminal or civil proceeding pursuant to the above-noted authorities, it will have to join as parties those law-enforcement agencies having custody of the property in question.

C: Appellant's "immunity" from court's order controlling property: Confusingly, appellant asserts that it "is immune"-from what is not clear. Appellant was never sued, and no monetary judgment coercive of appellant was ever entered. Appellant was merely directed to return a *res* it had

wrongfully removed from the circuit court's jurisdiction-a matter clearly within the court's authority to control. Ark. Code Ann. § 5-64-505(d). *See also Johnson v. Johnson*, 849 P.2d 1361, 1365 (city not immune from judgment for conversion of *res* it transferred to federal government for forfeiture; "[w]e will not allow the city to hide behind the immunity statute ... because to do so would allow the Fairbanks Police to continue to illegally transfer property with no recourse for aggrieved claimants.")

D. Venue in Pulaski County: Again, no lawsuit was filed against appellant, and appellant had no right to contest the forfeiture, having had no enforceable property interest in the *res* until forfeiture was complete. Thus, where venue lies for suits against appellant is wholly irrelevant, and the point is barred from review because it was not argued below. *See, e.g., Davis v. State*, 330 Ark. 501, 956 S.W.2d 163 (1997).

V. The Appellant Was Not A Party, And The Circuit Court's Orders Were, Nevertheless, Binding On Appellant

The appellant's fifth point simply repeats points already argued. The appellant again argues that it had an entitlement to contest the forfeiture proceedings as a party *or*, if not, the circuit court's orders cannot be binding on appellant. Again, as noted in response to Points II and IV, A, B, & D, the appellant had no right to contest a forfeiture of the property. While it may have had a "preference" regarding where the money was to be forfeited, its preference was not superior to the sovereign's decision, having first obtained jurisdiction, to forfeit the property within the state. Cf. In re Four Thousand One Hundred and Ninety Dollars, 641 N.Y.S.2d 814, 814 n..2 (Columbia Co. 1996) (When sovereigns decide which of them will take precedence as to a forfeiture, "there is no entitlement on the part of an affected individual to be allowed to assert a preference or,

indeed, play any role in the" decision.) Because the circuit court possessed the power to control the *res* and to forfeit it, its orders are indeed binding on the appellant. *See* Ark. Code Ann. § 5-64-505(d).

VI. The Trial Court Did Not Commit Reversible Error In Failing Specifically To "Quash" Or "Vacate" The March 18, 1998 Order Directing Appellant To Return The *Res*

Again, and without citing authority for the assertion, the appellant reasserts its argument that because it was not a party, the March 18, 1998, order directing it to return the *res* could not bind the appellant and, thus, should have been quashed or vacated. What has already been said in response to Points II, IV- A, B, & D, and V is applicable to this point, as well. Even Madewell v. Downs, 68 F.3d at 1040-43, a case upon which appellant heavily relies, suggests that when a state has a "turnover order" forfeiture scheme, the state court will have power to order return of property that was seized under state law, and transferred, without authorization, to federal authorities. As noted, Arkansas Code Annotated § 5-64-505 specifically contemplates that the circuit court possessed authority to control placement of the *res*. The fact that the circuit court directed that the *res* be deposited in a bank did not remove the court's authority to enter the order and, moreover, did not invalidate the order. *Cf. United States v. Check No. 25128 in the Amount of $58,654.11*, (9th Cir. 1997) (cashier's check, which represented proceeds of lawsuit against city for conversion of cash seized, was traceable and, hence, forfeitable); *$12,390.00*, 956 F.2d at 805-06 (noting that state court had power to order law enforcement agency to pay over equivalent sum of money that it had wrongfully converted by unauthorized transfer to federal authorities).

VII. The Trial Court Did Not Err In Finding The Crittenden County Prosecuting Attorney's Office To Be A "Seizing Agency"

Appellant argues at length that the office of a prosecuting attorney cannot be a "seizing agency," as that term is used in § 5-64-505. Appellee initially takes issue with appellant's assertion that § 5-64-505 refers only to "seizing law enforcement agenc[ies]" where control of seized property is concerned. While the statute is by no means a model of clarity, it clearly states that "seizing agenc[ies]," not "seizing law enforcement agenc[ies]," have authority to place the property under constructive seizure "by filing notice of pending forfeiture in any appropriate public record relating to the property"-something a prosecuting attorney would ordinarily do in connection with a forfeiture matter. The statute further notes that "the seizing agency ... may ... [r]equire the law enforcement agency to take custody of the property and remove it to an appropriate location for disposition in accordance with law"-as though the seizing agency may not always be a law enforcement agency. Ark. Code Ann. § 5-64-505 (j)(1)(v). And there is no question that the prosecuting attorney was heavily involved in the securing of the *res* (R. 273, 275, 287-95, 305-09). Thus, the circuit court did not clearly err when it found the prosecuting attorney's office to be a seizing agency, and the circuit court did not specifically find that the appellant was not a seizing agency.

Apparently, appellant makes this argument to bolster its claim that it had authority, as a seizing agency, to transfer the *res* to federal authorities. That is not the case. As noted in response to Point I, even if both the prosecuting agency and the law-enforcement agency agreed to transfer the *res*, a turnover order, nevertheless, would have been required, and the transfer was unauthorized and ineffective without one. Thus, this point does not entitle appellant to reversal.

VIII. The Trial Court Did Not Err In Reviewing Appellant's Decision To Contact Federal Authorities And Transfer The *Res* To Them.

A. Separation of powers: Appellant asserts that it is an executive agency that possesses discretion to determine whether a seized *res* should be forfeited in the state system or the federal system. Appellant may be part of an executive agency, and it is certainly a law-enforcement agency with authority to ensure the safekeeping of property seized in connection with its law-enforcement activities, but it has no authority to make the *judicial* decision regarding release of property from this state's jurisdiction so that another jurisdiction can assume forfeiture proceedings against that *res*. In fact. in those jurisdictions with "turnover order" scheme like Arkansas's, the transfer of the *res* is a *judicial* function, not one within the executive's authority. *See One 1979 Chevrolet C-20 VAN* 924 F.2d at 122 ("This case does not turn upon who won the forfeiture "foot race" in the courts, but rather upon the fact that there is no authority for the type of transfer between executives of agencies that took place here. To the contrary, such a transfer circumvents disposition of the *res* by the circuit court, as required by [state law]"); *United States v. $490,920.00*, 911 F.Supp. at 726 (quoting *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1144, 1145 (9th Cir. 1989) ("Absent 'some affirmative act of abandonment' of the property by the state court, the state court retains exclusive jurisdiction over the *res;* it is not sufficient for state executive authorities to approve the federal seizure of the *res*, because the exclusive *in rem* jurisdiction rule was 'intended to promote comity between courts, not executives.'")); *United States v. Sixty Thousand Six Hundred Dollars*, 899 F.Supp. 378, 379 (N.D. Ill. 1995)(noting that release from executive-branch official, rather than from judicial branch would be ineffective under state's turnover-order

scheme). If anyone violated separation of powers in transferring the *res*, it was the appellant.

B. Prosecutor's consent unnecessary for transfer because property in appellant's possession at time of transfer: Appellant argues that it did not need the prosecuting attorney's consent to transfer the *res* to federal authorities before a federal forfeiture could occur. While certainly desirable, whether the prosecutor's consent was necessary is irrelevant because, as noted in response to Point I, it was the "consent" of the circuit court, via a turnover order, that was necessary to make the transfer effective.

C. & D. State court without jurisdiction because state forfeiture petition not filed until after federal adoption: Again, appellant argues the jurisdictional point addressed under Point I. The appellee will not reiterate its response to that argument here.

IX. The Trial Court Did Not Clearly Err In Its Factual Determination That The Prosecuting Attorney Did Not Agree To Waive A State Forfeiture Proceeding And Pursue A Federal Forfeiture Proceeding.

Appellant argues that the prosecuting attorney waived state forfeiture proceedings and agreed to the transfer of the *res* and the pursuit of federal forfeiture proceedings. The circuit court made a factual determination, based on credibility assessments, that the prosecuting attorney did not agree to the transfer of the *res* to federal authorities for forfeiture. It is for the trial court to resolve the credibility of witnesses. *E.g., Noble v. State*, 319 Ark. 407, 420, 892 S.W.2d 477, 482 (1995). Moreover, the trial court's finding, is supported by the record, which reflects that even appellant's employees agreed that the deputy prosecuting attorney repeatedly noted that he would have

to get the approval of the prosecuting attorney before agreeing to a federal forfeiture of the *res* (R. 293, 296-97). No one testified that approval was ever secured. The finding is not clearly erroneous. Moreover, for reasons noted in response to Point I and Point VIII-B, with or without prosecutorial assent, the transfer was invalid because it was made without a turnover order.

X. The Entry Of The July 16, 1998, Judgment Does Not Change The Result In This Appeal.

While the appellee disputes that appellant's motion for reconsideration of a court order was the equivalent of a motion for new trial after judgment, as was the case in Arkansas State Hwy Comm'n v. Ayres, 311 Ark. 212, 842 S.W.2d 853 (1992), the point is irrelevant to the outcome of this appeal. The July 11, 1998, judgment does not change any of the court's final rulings on appellant's objections or on the matter of forfeiture. In fact, appellant is apparently unclear about what it wants this Court to do about that asserted error.

XI. For All The Reasons Already Stated, The Circuit Court Did Not Err In Rejecting Appellant's Motion For Reconsideration And Request For Specific Findings Of Fact And Conclusions Of Law.

Appellant's eleventh point simply condenses most of the previous points, which have already received response; thus, this point requires no further response.

CONCLUSION

Based on the foregoing, reasons and citations of authority, this Court should affirm the circuit court's decision in all respects and should deny the appellant's separate request,

in its brief, for costs and for an extraordinary writ, as this Court has once already denied an extraordinary writ in this matter.

Mark Pryor, Attorney General
By: /S/ Kelly K. Hill, Deputy Attorney General

IN THE SUPREME COURT OF ARKANSAS

In The Matter Of $3,166,199 Case No. 98-957

Arkansas Highway Police Appellant

v.

Crittenden County Prosecuting Attorney's Office;
Brent Davis, Prosecuting Attorney For
The Second Judicial District;
And State Of Arkansas, Nominal Plaintiff Below Appellees

Appellant's Reply Brief
(Filed February 8, 1999)

This Court has jurisdiction to determine whether the trial court correctly determined its own jurisdiction, but otherwise there is no state court jurisdiction at any level because the Court is being asked to invalidate a *federal* seizure. 28 U.S.C. §§ 1355 & 1356. Appellant prudently, properly, and lawfully requested and allowed the Drug Enforcement Administration ("DEA") to seize $3,166,199 in cash found in interstate commerce, with apparent connections to a *multi-state* drug transaction. AHP and Appellees agreed on only two issues below: (1) AHP was not a party, nor properly joined; and (2) the seizing agency had the authority to direct, permit, or request federal authorities to assist and pursue federal forfeiture proceedings. Appellees now argue for the first time that a

turnover order from the court is required before federal authorities may adopt or join or seize contraband discovered by state and local law enforcement agencies, even if there are no pending state *in rem* proceedings. In addition to being incorrect, Appellees are bound by the arguments made below under the doctrine of judicial estoppel. *Monterey Dev. v. Lawyer's Title Ins.*, 4 F.3d 605 (8th Cir. 1993).

Appellant requests relief by appeal *and*, alternatively, certiorari. *See, Dennison v. Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974). Subject matter jurisdiction should be considered before the standing arguments. *See, Hardy Constr. Co. v. Arkansas State Highway & Transp. Dep't*, 324 Ark. 496, 922 S.W.2d 705 (1996) (subject matter jurisdiction is paramount and considered first). The idea that a state trial court can, without notice or joinder, circumvent federal law, divest the federal courts of exclusive jurisdiction, forbid the cooperation of state and local law enforcement agencies, after-the-fact, and then adjudicate interests of non-parties, is proposition never sustained in any decision of any court that Appellant has been able to find. This case is analogous to a removal setting, where all actions of the state court are void until the matter is remanded from the federal court. *Harris v. State*, 41 Ark. App. 207, 850 S.W.2d 41 (1993). Similarly, once the *res* was "removed," even if the circuit court ever had jurisdiction over the *res*, any actions taken were void without the *res* being "remanded." See also, 28 U.S.C. §§ 1355 & 1356 (federal jurisdiction is exclusive).

The proceedings should be dismissed, but only in their entirety and including the circuit court proceedings below. *Should the appeal be dismissed without resolving the jurisdictional issues presented and without treating it as a petition for writ of certiorari, Appellant requests that the dismissal be without prejudice to AHP's right to plead further below.* In fact, Appellees argue that AHP has not yet filed the proper motion. Appellees' Br. at 4. A finding that AHP lacks

standing to appeal weighs in favor of issuing the writ because AHP would not possess an adequate remedy by direct appeal.

The procedural quagmire, wherein it is nearly impossible to determine which, if any, order is final, and AHP's status, was created by Appellees, not AHP. The problems were caused by Appellees' failure to observe even the most basic pleading and notice requirements. Instead, an order is entered in favor of non-party C against non-party D without notice, pleading, or a cause of action. Then, party A sues party B. Judgment is entered in favor of non-party C against party B. Non-party C then obtains orders amounting to judgments against the interests of non-party D and non-party E. Meanwhile, no cause of action has ever been pled against D and E and the subject matter of the suit, the *res*, was removed to federal custody, control, and jurisdiction even *before* the first order was entered, or the complaint filed.

Contrary to Appellees'[1] argument, neither the AHP nor the U.S. was required to intervene. Unless summoned to appear, a judgment will not affect the rights of a stranger. *Chase Nat. Bank v. Norwalk*, 291 U.S. 431 (1934). "[A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined." *Martin v. Wilks*, 490 U.S. 755 (1989).

Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound

[1]The Attorney General's appearance further illustrates the oddity of the proceedings below — the judgment did not forfeit the title to the plaintiff, the State. It forfeited title to non-party CCPAO, effectively substituting the CCPAO for the State. AHP also submits that several arguments advanced by the AG directly contradict those advanced below, but otherwise relies on its Response to Motion to Dismiss to argue that the AG should not be permitted to represent the CCPAO adversely to the interest of a State agency.

by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. Id. at 765. See also, *UHS of Ark., Inc. v. City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988) (one who does not intervene is not at risk of being bound by the litigation). Appellees' argument allows those burdens, as well as notice, venue, and immunity requirements, to be improperly shifted from the plaintiff by initiating proceedings in an *ex parte* manner, which occurred here.

In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990) *is* on point. AHP was never served or joined as a party. Martin; UHS. AHP possesses an interest in the state proceedings by virtue of Ark. Code Ann. § 5-64-505(k)(2)(iii), which provides that AHP is entitled to a share of the proceeds but offers (unlike the federal guidelines) little guidance in making that distribution. *E.g.*, *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997) (litigated distribution). Ordinarily there is no problem, but if a prosecuting attorney acts adversely to interest of the seizing agency, the seizing agency is placed in a position similar to that of a mortgagee in a condemnation or claimant in a probate proceeding, and is entitled to notice.

AHP also possesses agency interests in any review of its actions, whereby the Crittenden County Prosecuting Attorney's Office ("CCPAO") was allowed to pursue an unpled, untrue, and unnoticed, phantom conversion claim in an improper venue before a court having no jurisdiction. Harris. AHP's actions were proper and lawful, and it had an interest in any effort to adjudicate them once they were called into question. AHP and other state and local law enforcement agencies in

Arkansas, including those in Crittenden County, routinely cooperate with federal authorities in seizing assets and investigating criminal activity, particularly when, as here, the criminal activity appears to extend beyond state lines. The proceedings are an attack on AHP's ability to join or assist with federal investigations, and, even more importantly, report violations of federal law. AHP possesses significant public, state, and agency interests adversely affected by the proceedings, including making sure that possible criminal activities are fully investigated by proper authorities, promoting proper oversight and control over any seized and forfeited assets, and making sure that the criminal investigation remains the top priority.

Yes, there *is* a problem in determining the status of the proceedings, even whether a final order exists. Appellees' actions and procedural schemes bear no resemblance to *anything* authorized by the Arkansas Rules of Civil Procedure. An incomplete list includes: obtaining the *ex parte* order (which was not a mere turnover order) without a motion or even a pending cause of action; the issuance and return of a *search warrant* in a *civil case*; obtaining an order against AHP while arguing that AHP was not a party and without standing to assert anything; the absence of service of process and pleadings on the AHP or the U.S.; the refusal to join the U.S.; the affront to federal jurisdiction; the issuance of orders regarding a *res* never subject to the court's jurisdiction; arguing that AHP was, and then was not, the seizing agency; arguing that AHP is bound by the proceedings but not entitled to object or raise any arguments; and adjudicating the interests of known, un-joined third parties. It was Appellees' presentation of a fictitious case, not AHP's response, that was done in a "wholly inappropriate manner." Allen is a shield for those whose interests are adjudicated against them without proper notice or process — like here.

AHP's motion to reconsider below also met the requirements of *Arkansas Dep't of Human Servcs. v. R.P.*, 333

Ark. 516, 970 S.W.2d 225 (1998), as argued in its Response to Motion to Dismiss Appeal. See also, *Tapp v. Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987) (orders and judgment without trial were error). Excluding the U.S. and AHP, the orders on April 20 and 24, 1998 (also without notice to AHP), purported to hold that the circuit court had jurisdiction and forfeit all property interests in the *res*. The court then issued an order on May 8 denying AHP's Motion to Dismiss and, while not quashing the *ex parte* March 18 order, finding that AHP could not comply with it. This order was final because it disposed of the case. AHP filed a timely motion to reconsider and notice of appeal on May 18, timely designating all of the orders entered to that date. The court failed to rule on the motion to reconsider within 30 days and AHP filed a second notice of appeal on June 24, 1998, designating the failure to rule and, again, all of the earlier orders. The court entered another judgment/order on July 16, and AHP filed a third notice of appeal designating the July 16 judgment, the failure to rule, and the earlier orders. AHP then lodged the transcript in this Court within 90 days of the first notice of appeal.

I. THE CIRCUIT COURT LACKED JURISDICTION.

Under *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995); *Cole v. U.S.*, 136 F.3d 581 (8th Cir. 1998); and *Conrad v. Davis*, 120 F.3d 92 (8th Cir. 1997); exclusive federal jurisdiction attached first. Appellees' argument is in direct conflict with Madewell. Where was the *res* on March 20, 1998? The circuit court had no jurisdiction to even entertain any federal issues. 28 U.S.C. §§ 1355 & 1356 (federal jurisdiction was exclusive). AHP's argument is not a double standard. Federal law allows administrative forfeitures of currency regardless of size and Arkansas does not, so the federal proceedings and jurisdiction commence, for jurisdictional purposes, immediately upon the adoption or seizure. 21 C.F.R. § 1616.71 -1316.81. Arkansas has no procedure to establish *in rem* jurisdiction without the

filing of the complaint, especially when the *res* is over $100,000. Again, Madewell and the other cases hold that exclusive federal jurisdiction attaches immediately upon seizure or adoption by federal authorities. Federal law is the supreme law of the land and federal jurisdiction over federal seizures is exclusive. 28 U.S.C. §§ 1355 &1356. The proper means of questioning the federal adoption would have been to: a) issue a turnover order to the U.S. (removal); b) serve the U.S. with process in the state proceedings (removal, again); or c) dismiss or stay the state proceedings and litigate the issue in the pending federal proceedings (again, federal court decides the issues). The question "to seize, or not to seize," was ultimately the decision of the DEA, not AHP. The DEA could have declined the *res*, and the circuit court might have acquired exclusive jurisdiction when the complaint was filed on March 20, 1998.

Sgt. Davis' authority to make and adopt federal seizures is established by federal law. 21 U.S.C § 878. The AHP, Arkansas State Police, Little Rock and North Little Rock Police, Pulaski County Sheriff's Department, and other state and local agencies participate in joint task forces with federal authorities. Sgt. Davis has done so since 1990, and he adopted, if not joined, the seizure on the evening of March 7, 1998. Given the assistance provided by the DEA, the seizure can be characterized as a joint seizure. The references to federal actions and policies confirm that the court lacked jurisdiction and emphasize a) that the U.S. should have been joined below and b) the impropriety of the state proceedings in the absence of either the *res* or the U.S.. Appellees' statement that a "valid, good faith prosecutorial reason" is required for a federal adoption is ironic. From the moment it occurred, the seizure's location, size, and other circumstances made it self-evident that the investigation was a federal matter — regardless of the cap. Other federal *and state* interests in asking for federal assistance were and are advanced by AHP. A. 103-108, 114-129; Appellant's Br. at 249. Even the new Missouri statute *requires* the court to transfer the *res* to

federal jurisdiction "if the nature of the investigation or seizure would be better pursued under federal forfeiture statutes." Mo. Ann. Stat. § 513.647.2 (Vernon's Supp. 1999).

While sanctimoniously arguing that pecuniary concerns are inappropriate considerations for choosing between federal and state forfeiture proceedings, *pecuniary concerns are the* ***only*** *reasons ever advanced for* ***state*** *handling*. If consideration of the $250,000 cap is improper, it is equally improper to consider that federal authorities will receive 20 percent. *The DEA is handling nearly all of the criminal investigation*. Throw out all pecuniary considerations — AHP is amenable to that — and there is *no* reason for pursuit of state proceedings. (And what if the investigation stemming from this seizure leads to additional seizures in other jurisdictions and AHP/State is entitled to share in their distribution?) The federal nature of this matter is also evidenced by the fact that Appellant cannot find a single reported Arkansas case where a criminal defendant has been convicted solely for money laundering.

Turnover Order. The argument that a turnover order was required contradicts Appellees' argument below, was not made below, and is wrong. Appellees can point to no language in Ark. Code Ann. § 5-64-505, and are reduced to arguing that it is the "scheme," not the language, that requires a turnover order. *But see*, *Leach v. Cook*, 211 Ark. 763, 202 S.W.2d 359 (1947). First, the argument is barred by the doctrine of judicial estoppel, which prohibits a party from taking inconsistent positions in the same or subsequent litigation. *Monterey Development v. Lawyer's Title Ins.*, 4 F.3d 605. *Appellees agreed and argued below (which was the whole purpose of injecting the phony issue of who was the seizing agency) that "[t]he seizing agency has authority to say where the money goes."* A. 180 (emphasis added); see also, A. 89-91. Indeed, it was the only reason Appellees, after claiming that the *res* was seized by

AHP, see A. 29 & 36, suddenly decided to argue that the CCPAO had seized the *res*.

Second, AHP did not violate any provision of § 5-64-505. To the contrary, AHP's actions were authorized by state and federal law, and practice. Quoting Ark. Att'y Gen. Op. No. 91-416: "Equitable sharing of federal forfeiture funds between the federal government and state and local law enforcement agencies is authorized by 21 U.S.C. § 881(e)(1)(A) (Cum. Supp. 1991) and by 19 U.S.C. § 1616(a) (Cum. Supp. 1991)." Ark. Code Ann. § 5-64-505(d) deemed the money to be in the custody and control of AHP (if not the joint control of the DEA and AHP) and authorized AHP to "[r]emove the property to a place designated by it." Ark. Code Ann. § 5-64-505(j) authorized AHP to "[r]emove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, or ... deposit it in an interest-bearing account" or to "remove it to an appropriate location for disposition in accordance with law." The circuit court did not have jurisdiction because no civil forfeiture action had been commenced.

The statute authorizes removal and "disposition according to law" by the seizing agency. But even if Appellees' new argument is accepted, Ark. Code Ann. § 5-64-505 does not authorize the circuit court to transfer the *res* to federal jurisdiction, either. Appellees' argument misses the point, because *it was a federal seizure, not a state transfer*. Authority is found in the two hundred years of the adoptive seizure doctrine. *See,* Madewell; *U.S. v. One Ford Coupe Auto.*, 272 U.S. 321, 325 (1926). If Appellees' new argument regarding § 5-64-505's interpretation is correct, it conflicts with federal law effectively prohibits federal seizures. The remedy, when *in personam* jurisdiction only is established, is for the court to hold the state or federal officials in contempt, which the circuit court did not do. *Upon reasonable suspicion that the res is connected to illegal drug activity, it is appropriate for a state*

law enforcement officer to transfer the res to the DEA. Conrad v. Davis, 120 F.3d 92 (8th Cir. 1997). The Eighth Circuit wrote:

> Based on the circumstances of Conrad's stop and the inconsistent answers to Davis's questions, Davis had reasonable suspicion that the money discovered as part of the search was involved in illegal drug activity.... Once Officer Kenley told Davis that the drug dog had alerted to the money, *Davis acted appropriately in transferring the funds to the DEA for forfeiture proceedings. Davis's actions were reasonable* and he is therefore entitled to qualified immunity....

Id. (Emphasis added.) Quoting the district court opinion in Madewell, "*The Patrol had the right to transfer the seized currency to the DEA and the DEA had the right to accept it.*" (Emphasis added.) The Arkansas Attorney General has issued opinions advising local agencies on the disposition of proceeds from federal forfeitures without a hint that the use of federal proceedings is improper. *E.g.*, Op. Ark. Att'y Gen. No. 91-416 (March 10, 1992).

Ark. Code Ann. § 5-64-505, like Missouri's old statute in Madewell, contains no language requiring a turnover order or establishing state *in rem* jurisdiction. *Leach v. Cook* is illustrative. The Commissioner, with state wide jurisdiction (like AHP), removed (like AHP) liquor seized in Chicot County to Pulaski County, where forfeiture proceedings were commenced. When the Pulaski County proceedings were challenged because the language in that forfeiture statute required the proceedings to be filed in the court having jurisdiction, this Court found the transfer and Pulaski County proceedings proper, noting that the language in the statute begged the question. A court must first *establish* jurisdiction to *have* jurisdiction. Further, § 5-64-505 authorizes either *in personam* or *in rem* proceedings, the nature

of the jurisdiction being exercised cannot even be determined until the complaint is filed.

Appellees' error is also shown by the fact that they are arguing that an order is required to release the *res* to federal custody, while no order is required to release the *defendant* to federal custody. *See, State v. Zamarripa*, No. CR 98-250 (Crittenden Co. Cir. Ct. *filed* March 10, 1998).

Requesting assistance from, and cooperating with, federal authorities is standard practice of law enforcement agencies throughout the state, including Crittenden County (with the exception of CCPAO). At the hearing, the trial court stated that it was unaware of any forfeiture money having been paid into the State fund, A. 190, even though the exhibits attached to AHP's reply and motion to reconsider, show that less than one year before this seizure, the *same Deputy Prosecutor* approved the transfer (without court order) of $746,844 in cash seized by the West Memphis Police Department to federal jurisdiction. A. 90. When state actions *are* brought by the CCPAO, the exhibits demonstrate creative efforts to avoid the $250,000 cap. In one uncontested proceeding less than six months before this seizure, the circuit court and Appellees split one $450,000 *res* into two $225,000 shares to keep all of the money in the CCPAO. A. 114-115.

Appellees' cases, *U.S. v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120 (7th Cir. 1991); *U.S. v. One 1987 Mercedes Benz Roadster*, 2 F.3d 241 (7th Cir. 1993); *Scarabin v. Drug Enforcement Administration*, 966 F.2d 989 (5th Cir. 1992); *U.S. v. $490,920*, 911 F. Supp. 720 (S.D.N.Y. 1996); & *Johnson v. Johnson*, 849 P.2d 1361 (Ak. 1993); are all inapplicable. As interpreted by Appellees, they would conflict with 28 U.S.C. §§ 1355 & 1356 and Madewell, and *preempt federal law with state law*. Also, either the seizures were made under a state warrant; *e.g.*, One 1979 Chevrolet C-20 Van; or state law

specifically provided that exclusive state *in rem* jurisdiction attached upon seizure, *E.g.*, Scarabin. None involve a *state court* attempting to adjudicate federal *in rem* jurisdiction. The DEA seizure occurred *before* state *in rem* proceedings were commenced on March 20, 1998, but the circuit court had no jurisdiction to even make that determination, much less one to the contrary.

Without the *res*, a state court has no jurisdiction. *King v. State*, 443 S.E.2d 844 (Ga. 1994); and *Conrod v. Missouri State Highway Patrol*, 810 S.W.2d 614 (Mo. App. 1991); address the *in rem* jurisdiction issue in *state* proceedings. The trial court lacked jurisdiction to enter any of the orders below. King, *citing*, *U.S. v. One 1986 Chevrolet Van*, 927 F.2d 39 (1st Cir. 1991).

II. THE UNITED STATES AND AHP WERE NECESSARY PARTIES.

The circuit court purported to adjudicate the interests of the U.S. and AHP in the *res* without requiring their joinder as parties, or even having the *res* before it. The U.S. has the *res*, and it is Appellees who make only a "bare assertion" of interest in the *res*. Failure to join necessary parties is a Rule 12(b) defense and Rule 19 expressly provides that the court should consider whether the matter should be dismissed. At the April 1 hearing, the circuit court indicated that the U.S. should be joined, but the Deputy Prosecutor refused. A. 227. Either the U.S. should have been joined or the matter should have been dismissed. In condemnation cases, all known interest holders must be served; nevertheless, although Appellees had actual knowledge that both AHP and U.S. claimed interests in the *res*, Appellees failed to serve summons or complaint on either. The U.S. has had physical custody of the *res* since March 10, 1998, ten days before the complaint was filed. It is inconceivable that the U.S. should not have been joined.

Although the relation back of title under 21 U.S.C. § 881(h) cannot cut off an "innocent owner" defense, Appellees' knew about the federal proceedings and were not "innocent owners." *See, Eggleston v. State*, 873 F.2d 242 (10th Cir. 1989), *limited in, U.S. v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993). *U.S. v. Mikell*, 33 F.3d 11, 13 (7th Cir. 1994) (owner in 21 U.S.C. § 881(a)(7) is one who has title at time proceedings are commenced).

If AHP was not a necessary party, then why were the *ex parte* and other orders obtained? Once the CCPAO decided to act and seek orders and judgments adverse to AHP's interest, and, in substance, create an unpled, unnoticed, fictitious conversion claim (which, if it were going to be pled, belonged in Pulaski County), AHP was entitled to notice by service of process. Not even the forfeiture complaint, which does not state a claim against AHP, was ever served on AHP.

Although Ark. R. Crim. P. 15.2 was not argued below, criminal proceedings are *in personam* and do not establish the court's exclusive in rem jurisdiction over the *res*. Madewell. *See*, Ark. R. Crim. P. 15.2(c) (no custody order until motion is filed). Rule 15.2 does not provide *in rem* jurisdiction, and without the *res*, there was no jurisdiction to commence the state forfeiture proceedings. The appropriate remedy had AHP acted unlawfully would have been contempt, which the circuit court rejected, not to continue the civil action.

III. DEA ADMINISTRATIVE PROCEEDINGS.

Madewell governs the federal issues, but the circuit court, again, lacked jurisdiction to make any ruling regarding the federal proceedings. 28 U.S.C. §§ 1355 & 1356. The DEA seized the *res* prior to March 20, 1998. Sgt. Davis was a sworn agent of the DEA, and as a matter of law, had authority to make and adopt federal seizures. 21 U.S.C. § 878. The DEA has

apparently determined that the seizure was appropriate since it still has the *res*.

IV. THE COURT LACKED JURISDICTION OVER AHP.

Everyone agrees that AHP was not made a party. Nevertheless, the CCPAO was allowed to pursue an unidentified, unpled, unnoticed, untried, and untrue claim. If the CCPAO thought AHP "converted" the *res*, it was welcome to file and try the action before a jury in Pulaski County, the proper venue, where Appellant believes the pleadings would have been found sanctionable. In R.P., there was a specific statutory waiver of the DHS's immunity, which is not present here. AHP's removal of the *res* was appropriate. Leach; Madewell; & Conrad. The Deputy Prosecutor had full knowledge that AHP had removed the *res*. A. 26-27, 29. The issue of venue (if the CCPAO were attempting to plead a cause of action against AHP) was raised below. A. 82.

V. THE COURT'S RULINGS ARE NOT BINDING ON AHP.

There is specific agreement that AHP was never properly made a party. As argued *supra*, unless summoned to appear, a judgment will not affect the rights of a stranger. Martin; *Chase Nat. Bank; & UHS v. Sherwood*. The argument that AHP had no authority to determine which jurisdiction handled the seizure contradicts Appellees' specific argument below, which was that the seizing agency has the authority to determine whether the forfeiture is handled through the state or federal system. A. 180. Monterey Title. *"The seizing agency has authority to say where the money goes."* A. 180 (emphasis added).

VI. FAILING TO QUASH THE *EX PARTE* ORDER.

The forfeiture is a civil lawsuit, separate and apart from the criminal proceeding. The March 18 order was the source of AHP's involvement, and improperly kept AHP involved in the proceedings when it was not quashed. AHP was prejudiced by having all of the ordinary burdens of pleading and proving the court's jurisdiction to issue the orders reversed because of the wholly improper order. The attempt to mischaracterize it as merely a turnover order is belied by the fact that it was not issued in the criminal case, and directed AHP to *deposit* the money to be *wired* to the CCPAO, destroying any evidentiary value (which, along with the rest of the record, contradicts Mr. Hale, Jr.'s testimony that he directed AHP to take the money to the Crime Lab). Even orders entered pursuant to § 5-64-505 are subject to the requirements of Ark. R. Civ. P. 65. The *ex parte* order reversed the burdens of pleading and proof regarding the court's jurisdiction and tainted the entire matter. *E.g.*, Jones v. Jones, 326 Ark. 481, 931 S.W.2d 767 (1996).

VII. AHP IS THE SEIZING AGENCY.

Appellees, not Appellant, interjected this issue because it was never disputed that the seizing agency had authority to direct the matter to either federal or state court. Again, the new argument that a turnover order is required when the court has not established *in rem* jurisdiction, is new and directly contrary to what was argued below. Appellees are bound by their arguments below. Monterey, 4 F.3d 605. If AHP the *res* was merely in AHP's possession, Appellees' failed to serve AHP. See, Ark. R. Civ. P. 5(a). In one of the few issues on which AHP and Appellees agreed, it was never disputed below that the seizing agency has authority to direct the money to federal authorities. A. 180. AHP removed the *res* to Little Rock, as it was expressly authorized to do, and the *res* was seized in Little

Rock by the DEA no later than the morning of March 10, 1998 (even if its seizure were not complete on March 7, 1998), as it was expressly authorized to do. Although AHP certainly did not object, its objection would have been irrelevant. The question "to seize, or not to seize," is the decision of the DEA, not AHP, as is the matter of whether a federal investigation will be conducted.

VIII. AHP'S DECISION TO REQUEST DEA ASSISTANCE.

Finding $3.2 Million cash warranted investigation, and, since it was obvious that a multi-state investigation was required, AHP requested assistance from the DEA, which was provided. The request to DEA for assistance was a discretionary, executive decision, not subject to review by the court. Again, *the federal seizure was the DEA's decision*. There was no pending state forfeiture action and no orders of attachment. Again, the circuit court found that AHP could not have complied with the first order it entered. Again, § 5-64-505 does not require a turnover order and does not establish the state court's exclusive *in rem* jurisdiction. Even Missouri's new law would *require* the court to transfer the *res* to federal authorities under these facts. Mo. Stat. Ann. § 513.647.2. If $3.2 Million of cocaine had been found, who should handle the investigation?

IX. PROSECUTING ATTORNEY'S AGREEMENT.

The Prosecuting Attorney's consent was not required, but it cannot be disputed from the record that the Deputy Prosecutor at least agreed to the transfer of the *res* to Pulaski County. Appellees' argument is now that no decision had been made regarding the forfeiture action *res* by the Prosecuting Attorney, which further proves that no state proceeding had

been commenced and there was no state *in rem* jurisdiction until March 20, 1998.

X & XI. JULY 16 JUDGMENT & DENIAL OF MOTION TO RECONSIDER.

The Court should vacate or reverse all orders of the circuit court, and dismiss the proceedings for want of jurisdiction, regardless whether the May 8 Order or July 16 Judgment is the final order.

CONCLUSION

Appellant prays that the Court vacate or reverse the orders of the circuit court, and dismiss these proceedings without prejudice. The trial court lacked jurisdiction over the *res*, subject matter, and parties. Relief is appropriate by both appeal and certiorari. But should the Court dismiss this appeal, only, and also deny the writ, Appellant prays that it be done without prejudice to its ability to plead further below.

IN THE SUPREME COURT OF ARKANSAS

In The Matter Of $3,166,199 Case No. 98-957

Arkansas Highway Police Appellant

v.

Crittenden County Prosecuting Attorney's Office;
Brent Davis, Prosecuting Attorney For
The Second Judicial District;
And State Of Arkansas, Nominal Plaintiff Below Appellees

Petition for Rehearing
(Filed April 2, 1999)

Appellant, Arkansas Highway Police ("AHP"), for its Petition for Rehearing, states:

1. The Court's recitation of the facts is generally correct, although: (a) the DEA took physical possession of the *res* on March 10, 1998; (b) all of the forfeiture orders purported to forfeit *title* of the *res* to the "Crittenden County Prosecuting Attorneys Office," not the State; (c) the forfeiture orders were entered on April 20 & 24, 1998, before the circuit court even ruled on the motion to dismiss; and, (d) DEA administrative proceedings *were* pending when the complaint was filed on March 20, 1998. The Court appears to have completely missed the legal effect of the adoption — *the adoption was a federal seizure*. Officer Smith seized the *res*, and then DEA TFO Davis, while the *res* was in the custody of AHP, seized the *res* pursuant to federal law. There is no issue whether there was a state seizure or federal seizure — there were both, a state seizure followed by a federal seizure which related back, or a joint, federal-state seizure. It is AHP's understanding that the DEA contends that there was a *joint* seizure, but, because of the absence of service,

it has never had an opportunity to litigate the merits of its claim in the appropriate *federal* forum.

2. Because there *was* a federal seizure, the issues before the Court were of *federal* law and state and federal constitutional law, which, even aside from whether state courts have jurisdiction to even entertain the questions, should have been addressed before any statutory analysis, regardless whether a state seizure occurred. Neither the circuit court nor this Court had, or have, subject matter jurisdiction to even determine the questions, including the interpretation of Ark. Code Ann. § 5-64-505. 28 U.S.C. §§ 1355 & 1356 provide for *exclusive federal jurisdiction*. "The district courts shall have original jurisdiction, *exclusive of the courts of the States*, of any *seizure* under any law of the United States on land or upon waters ...." 28 U.S.C. § 1356 (emphasis added). The Court's opinion did not mention these two statutes, which expressly preclude state court jurisdiction. "The Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Testa v. Katt*, 330 U.S. 386 (1947), *quoting, Claflin v. Houseman*, 93 U.S. 130 (1876).

28 U.S.C. §§ 1355 & 1356 have the same origins and purposes as the federal officer removal statutes at issue in *Willingham v. Morgan*, 395 U.S. 402 (1969). The origins are traceable to the Nullification Crisis of 1833, and their purpose is to protect federal officers from "interference from hostile state courts." Quoting from Willingham (including citations):

> The federal officer removal statute has had a long history. See H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 1147-1150 (1953). The first such removal provision was included in an 1815 customs statute. Act of

February 4, 1815, § 8, 3 Stat. 198. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done "under color" of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts. This provision was not, however, permanent; it was by its terms to expire at the end of the war. But other periods of national stress spawned similar enactments. South Carolina's threats of nullification in 1833 led to the passage of the so-called Force Bill, which allowed removal of all suits or prosecutions for acts done under the customs laws. Act of March 2, 1833, § 3, 4 Stat. 633. A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws. Rev. Stat. § 643 (1874); Judicial Code of 1911, § 33, 36 Stat. 1097. Finally, Congress extended the statute to cover all federal officers when it passed the current provision as part of the Judicial Code of 1948. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947).

The purpose of all these enactments is not hard to discern. As this Court said nearly 90 years ago in *Tennessee v. Davis*, 100 U.S. 257, 263 (1880), the Federal Government:

> can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, - if their protection must be left to the action of the State court, - the operations of the general government may at any time be arrested at the will of one of its members.
>
> .... Federal jurisdiction rests on a "federal interest in the matter," *Poss v. Lieberman*, 299 F.2d 358, 359 (C. A. 2d Cir.), *cert. denied*, 370 U.S. 944 (1962), the very basic interest in the enforcement of federal law through federal officials.

Willingham, at 405-406. For exactly the same reasons, 28 U.S.C. §§ 1355 & 1356 also prohibit interference of hostile state courts by placing all decisions regarding seizures made under color of federal authority exclusively within the province of the federal courts, while expressly excluding state courts from making those determinations. *State and local law enforcement agencies have no authority to resist seizures by federal agencies under color of federal law, regardless whether or not state law requires a turnover order.*

The Court's opinion, in fact, preempts federal law with state law. To the extent that Section 5-64-505 is interpreted to permit state courts or state agencies to interfere with, prevent, or exercise jurisdiction over, seizures of contraband claimed to have been made by federal agencies, it is unconstitutional. No

state can preempt or prohibit enforcement of a federal law, regardless whether the attempt is made by the legislative, executive, or even judicial branch of the state. The issue was decided by the Civil War. South Carolina's Nullification Ordinance attempted to prohibit collection and enforcement of federal tariff and custom laws (including seizures), including by the use of state courts. See, Robert V. Remini, Andrew Jackson, Vol. III, The Course of American Democracy 8-44 (1984). The Court's interpretation of Section 5-64-505, similarly, allows state law to preempt or prohibit enforcement of federal laws regarding seizure and forfeiture of contraband. President Jackson, in addition to sending troops and arresting and hanging the proponents of nullification, said:

> I consider, then, the power to annul a law of the United States, assumed by one State, *incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.*

Andrew Jackson, Presidential Proclamation (Dec. 10, 1832) (emphasis in original), *in* Compilation of the Messages and Papers of the Presidents, II, 1203-1204, (J. D. Richardson, ed., Washington, D.C., 1908); quoted in, Remini, *supra*, at 20. No state, whether by its legislature, its executive agencies, or its judiciary, can preempt, invalidate, or nullify a federal law. Appellant respectfully submits that the interpretation of Section 5-64-505 in the Court's opinion is such an effort, albeit unintentional. If the circumstances of the present case are inappropriate for a turnover order (or at least restraint in asserting state jurisdiction), there will *never* be a case where a transfer should be ordered. The result of the Court's holding is that a state court can interpret and apply state law to preempt

21 U.S.C. § 881 and 28 U.S.C. §§ 1355 & 1356, and prohibit federal agencies from enforcing federal laws. At its core, this is simply a re-warming of the atavistic nullification argument. It is federal law that is the supreme law of the land under the Supremacy Clause of the United States Constitution, not the other way around.

As a general proposition, some judicial review to ensure that federal interests are implicated in federal seizures is not a bad idea, but *federal* courts, not state courts, are the only ones with jurisdiction to make that determination. Unlike the removal statutes, 28 U.S.C. §§ 1355 & 1356 do not allow exercise of state jurisdiction at all. AHP and the United States have also never been served with process in the state proceedings, and the forfeiture orders were secretly signed and entered *before* AHP's motion was even decided. Federal authorities had no opportunity to contest or remove the state proceedings, or petition for transfer of the *res*. AHP never had a full or fair opportunity to petition for "transfer" of the *res*, or fully litigate all issues.

3. The Court further erred by failing to consider whether the United States was a necessary party to the state proceedings. The United States seized the *res* pursuant to federal law, possessed the *res*, and claimed ownership of the *res* pursuant to 21 U.S.C. § 881(h). The United States still possesses and controls the *res*. In a condemnation, which is what any forfeiture action is, the owner of *any* interest in the property "is a proper and *necessary party* to the action." *Arkansas State Highway Comm'n v. Roberts*, 248 Ark. 1005, 455 S.W.2d 125 (1970) (emphasis added). *See, United States v. $119,000*, 793 F. Supp. 246 (D. Hawaii 1992) (federal jurisdiction attaches at time of adoption and state action is not *res judicata* if United States is not a party). A court must obtain jurisdiction over the parties *before* a decision on the issues can be rendered.

4. The Court also erred by failing to consider the separation of powers and immunity arguments, which are jurisdictional and constitutional in nature, before construing Section 5-64-505. The statute cannot be construed to violate Ark. Const. art. 4, § 2 & art. 5, § 20.

5. With regard to the Court's construction of Section 5-64-505 as a "turnover statute," the parties agreed below that a court order was not required. The Court overlooked the fact that *Appellees agreed and argued below that "[t]he seizing agency has authority to say where the money goes."* Hale, III, Abstr. at 180 (emphasis added); see also, Abstr. 89-91. AHP respectfully submits that the Court erred in failing to address whether Appellees were bound by that argument under the doctrine of judicial estoppel. *Monterey Dev. v. Lawyer's Title Ins.*, 4 F.3d 605 (8th Cir. 1993).

6. Nevertheless, Section 5-64-505 does not mention the word "turnover" anywhere. Instead, the statute expressly states that the seizing law enforcement agency may "remove [the *res*] to an appropriate location for disposition in accordance with law," Ark. Code Ann. § 5-64-505(j)(1)(v), with no mention of the court order referred to in other subparagraphs (and no requirement that the disposing "law" be state law). The Court's construction conflicts with Ark. Code Ann. § 5-64-505(m) & (n), which provide that forfeiture actions may be brought either *in personam* or *in rem*. How can one tell until the complaint is filed? The construction conflicts with Ark. Code Ann. § 5-64-509, which permits the prosecuting attorney to forfeit property of less than $100,000 value *with no court filing or order at all*. If Section 5-64-505 establishes the jurisdiction of the Court immediately upon seizure, how can it be reconciled with § 5-64-509, which expressly provides for uncontested proceedings without *any* court involvement? It could not possibly have been the intent of the legislature to vest the circuit court with jurisdiction at the moment the *res* is seized, otherwise § 5-64-

509 would not exist. The Court's opinion also failed to address *Leach v. Cook*, 211 Ark. 763, 202 S.W.2d 359 (1947); which construed an almost identically worded statute to allow the seizing agency to choose the venue in which the forfeiture would be brought. The Court's construction also conflicts with Ark. R. Civ. P. 3, which was not mentioned in the Court's opinion, and Ark. Code Ann. § 5-64-504, which *requires* cooperation with federal agencies. AHP further respectfully submits that the Court's construction of Section 5-64-505 conflicts with the Court's own rulings that the meanings of statutes are based on the legislature's intent as gleaned from the ordinary meaning of the words, statutes relating to the same subject must be construed together and in harmony, if possible, and that a statute will be construed in such a manner as to pass constitutional muster, if possible. Instead, AHP as respectfully as possible submits that the Court has, in an advisory opinion, construed an otherwise *constitutional* statute in a manner that renders the statute *unconstitutional*.

7. Even if the interpretation were correct regarding initial jurisdiction, the Court must still vacate the orders purporting to forfeit the *res* and remand this case for further proceedings, including a petition to the circuit court for a "turnover" order (even though the court does not have the *res*). While the *res* was in the custody and control of the United States and subject to the federal proceedings, any action taken by the circuit court regarding the *res* was void — like when any case is removed from state to federal court. *Harris v. State*, 41 Ark. App. 207, 850 S.W.2d 41 (1993). Where a state court's forfeiture order is based on evidence taken at a time when the circuit court had no jurisdiction, the order is void. Id. The Court's opinion failed to address Harris, *which was a forfeiture case involving entry of the forfeiture orders while the circuit court had no jurisdiction because of a federal removal*. Even if the Court finds that the circuit court's attempted exercise of jurisdiction was appropriate, the matter must still be remanded

for further proceedings. The Court correctly characterized the circuit court's actions as an "attempted exercise of jurisdiction." The key word is "*attempted*," which means that the circuit court *did not actually have* jurisdiction at the time that it entered its orders. The Court's opinion also provides no guidance as to when it would be appropriate or mandatory for a state court to "permit" a federal seizure, and AHP respectfully submits that the Court should clarify the issue. In fact, AHP submits that, based on the record, *this* Court can and should issue an order formally transferring the *res* to, or acknowledging, federal jurisdiction.

8. The Court erred in rejecting *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995). *Cole v. United States*, 136 F.3d 581 (8th Cir. 1998) was decided *after* Missouri adopted its turnover statute, Mo. Ann. Stat. § 513.647.2 (Supp. 1999), but even that statute *requires* the *res'* transfer to federal authorities under these facts. Aside from the fact that federal jurisdiction is exclusive, Arkansas is located within the Eighth Circuit Court of Appeals, and the Eighth Circuit's rulings are controlling authority on federal issues and federal agencies operating in Arkansas. Even if Section 5-64-505 expressly stated that a turnover order were required, a state official or agency cannot lawfully resist a federal seizure. Even the cases relied upon by the Court were decided by *federal* courts, not state courts. *There is no case anywhere, that counsel has been able to locate, in which a state court has attempted to directly invalidate a federal seizure/adoption, like here.* The Court also failed to address *King v. State*, 443 S.E.2d 844 (Ga. 1994) (Ga. Code Ann. § 16-13-49(k) contains the same "subject only to the orders" language); *United States v. Winston-Salem/Forsyth County Bd. of Ed.*, 902 F. 2d 267 (4th Cir. 1990); *United States v. Certain Real Property*, 986 F.2d 990 (6th Cir. 1993); and, *Conrod v. Missouri State Highway Patrol*, 810 S.W.2d 614 (Mo. App. 1991). Regarding quoted language concerning AHP passing the *res* on "as it pleases to [federal authorities] in flagrant disregard

of state laws mandating judicial authority for such turnovers," AHP emphatically rejects that mischaracterization. AHP's actions were consistent with the understandings of every law enforcement agency, prosecuting attorney, and circuit court (given that not a penny was in the State fund) in this State, and the Attorney General, until this case; as well as at least the First, Fourth, Sixth, and Eighth Circuits. AHP was authorized by, complying with, and acting according to, *federal law*. The Court cited no language in 5-64-505 even mentioning a turnover order. *United States v. One 1979 Chevrolet Van*, 924 F.2d 120 (7th Cir. 1991); and *Scarabin v. Drug Enforcement Administration*, 966 F.2d 989 (5th Cir. 1992); are analytically, historically, and practically flawed, as noted above, and conflict with Madewell, which is the controlling law in the real world in which Arkansas law enforcement agencies must operate. Neither One 1979 Chevrolet nor Scarabin implicated significant federal interests. Neither mentioned 28 U.S.C. §§ 1355 & 1356. Neither case involved an initial stop based on federal regulatory authority, a huge multi-state shipment and transaction, interstate commerce, or an active federal investigation and prosecution. *See, United States v. Zamarripa*, No. CR 99-113 (S.D. Tex., *Indictment* Feb. 24, 1999). Active state investigations and prosecutions were also present in each, but not here.

9. The circuit court and this Court lacked and lack:

a) jurisdiction of the *subject matter*; 28 U.S.C. §§ 1355 & 1356;

b) jurisdiction of the *res*; *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995); *Conrad v. Davis*, 120 F.3d 92 (8th Cir. 1997); and *United States v. $12,390.00*, 956 F.2d 801 (8th Cir. 1992); and Ark. R. Civ. P. 3; and,

c) jurisdiction of the necessary *parties*, AHP and the United States. *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Martin v. Wilks*, 490 U.S. 755, 763 (1989).

10. State and federal law enforcement officials work together on a daily basis to enforce the laws of the United States and the States. Joint participation in searches and seizures, as well as sharing information (including, as here, information that helps determine the probable cause for forfeiture), are common. Cooperation between state and federal agencies is expressly authorized by Ark. Code Ann. § 5-64-504 ("shall cooperate"), 21 U.S.C. § 878, and other provisions. By reading what is not there, AHP respectfully submits that the Court's decision has blind-sided law enforcement agencies in all 75 counties, as well as prosecutors, and will render it much more difficult for state and federal agencies to cooperate in Arkansas. The primary beneficiaries will be the participants in drug and money-laundering transactions in other states and countries who escape notice, and the occasional local official more interested in the currency than investigating, finding, and prosecuting drug traffickers. The failure of the Court to conform to Eighth Circuit precedent puts agencies in an impossible bind. Are state agencies prohibited from informing federal agencies of violations of federal law and cooperating with their investigations? Are state agencies supposed to resist federal agencies attempting to make seizures? AHP respectfully submits that such questions demonstrate that the newly-created turnover order requirement is simply a rehash of the Nullification Doctrine, in the line of periodic state efforts to defy, nullify, or preempt federal law — *e.g.*, Ark. Const. amend. 44.

11. AHP respectfully submits that the Court repeated the error of the circuit court in attempting to assume jurisdiction of this matter, and in rejecting Eighth Circuit precedent on federal issues. Although rulings of the Circuit Courts are not

ordinarily controlling on state courts, the "federal interest in this matter" and the presence of 28 U.S.C. §§ 1355 & 1356 make Eighth Circuit rulings controlling in this case.

THEREFORE, AHP prays that the Court rule on the constitutional and jurisdictional issues, which should have been addressed before the statutory construction analysis; reverse and dismiss these proceedings; or, alternatively, remand for further proceedings, including whether a turnover order (even with no *res*) is appropriate; or, at least that application of the Court's ruling be prospective only. *The undersigned respectfully certifies that the foregoing petition has merit, is not filed for the purposes of delay, and has been served on opposing counsel.*

/S/ Robert L. Wilson, Chief Counsel

IN THE SUPREME COURT OF ARKANSAS

In The Matter Of $3,166,199 Case No. 98-957

Arkansas Highway Police Appellant

v.

Crittenden County Prosecuting Attorney's Office;
Brent Davis, Prosecuting Attorney For
The Second Judicial District;
And State Of Arkansas, Nominal Plaintiff Below Appellees

Supplemental Citation Of Authority
In Support Of Petition For Rehearing
(Filed April 6, 1999)

Appellant, Arkansas Highway Police ("AHP"), for its Supplemental Citation of Authority in Support of Petition for Rehearing, states:

1. AHP filed its Petition for Rehearing on Friday, April 2, 1999, which included a request that this Court consider and rule on AHP's argument that the circuit court (and this Court) also lacked jurisdiction to render the rulings below because the United States and AHP were never served with process.

2. On Monday, April 5, 1999, the United States Supreme Court rendered its decision in *Murphy Brothers, Inc. v. Mechetti Pipe Stringing, Inc.*, No. 97-1909, ___ U.S. ___ (April 5, 1999), which AHP cites in support of the argument that it was error for the circuit court and this Court to exercise, or attempt to exercise, jurisdiction in this matter in the absence of service on the United States and the AHP.

RESPECTFULLY SUBMITTED,
ARKANSAS HIGHWAY POLICE
/S/ Robert L. Wilson, Chief Counsel

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas	Plaintiff
v.	
$3,166,199 U.S. Currency	Defendant
Roberto V. Zamarripa	
Omar Saenz	Claimants

Transcript of Hearing
April 1, 1998

COURT: Is there anybody here with the U.S. Attorney's Office? R. 234.

MR. JACKSON: No, your Honor. It's my understanding that they've never been made a party.

COURT: They were notified by the Court to be here if they had any interest in it.

MR. JACKSON: They have never been made a party to these proceedings.

COURT: Well, there's a file filed in state court. They were notified that if they had any interest in it to be here. So was the U.S. Attorney's office, the U.S. Marshal. Is anyone from the U.S. Marshal's Office here?

(No Response)

COURT: I assume the Highway Police is here.

MR. WHARTON: Your honor, my name is William Wharton. I represent the Highway Police, and the man standing

to my right is Lawrence Jackson. He's also a staff attorney for the Highway Police.

COURT: I talked to Mr. Jackson on the telephone earlier. What about Bill Bryant of the DEA? Is he here? R. 235.

MR. WHARTON: No sir, he is not.

COURT: Well, they were served notice to be here.

MR. JACKSON: Your Honor, for the record, I would like to state —

MR. HALE, III: Your Honor, I'm going to object. He — they are not here. They represent the Highway Department. They cannot represent other agencies.

MR. JACKSON: We are not pretending to speak for the other agencies. It's my understanding the Feds have never been served with civil process. There are — especially when you're dealing with federal agencies — there are very specific requirements under both federal and state law for making them parties, for bringing them into a lawsuit. Those have not been complied with.

COURT: I'm not sure —

MR. HALE, III: The don't have any interest in this anyway. If they want to intervene, let them intervene. R. 235.

MR. JACKSON: But that's something that —

MR. HALE, III: If they want to intervene, let them intervene, your Honor, let them file a motion to intervene. R. 236.

COURT: Well, all I know is I sent notice to everybody mentioned in it to be here if they had any interest in this matter. So let's — I understand Mr. Hale wants a continuance and the Highway Department's objecting to it, and I am going to let you proceed at this point on the motion to vacate the order that I entered to require the money be deposited in a federally insured depository and redeposited in the Crittenden County Drug Task Force.

When I entered that order, it was with the idea to secure and preserve the money and for no other purpose. So I did not even see where it was even an order that was subject to being contested or — at the point, I did not realize there was any adversarial nature other than whoever the proposed owner of the money might be. So let's proceed.

MR. WHARTON: Your Honor, as an officer of the court, I can tell you with surety that the money has been secured and is secured now in the possession of the federal government. If that was the sole purpose at the time of the Court's entry of the order, that purpose of the order — I can assure the Court as an officer that the purpose has been fulfilled. R.236.

. . . .

COURT: I would like to know why anybody thinks the Court doesn't have jurisdiction. It occurred in Crittenden County, Arkansas, without any question. It was a crime that occurred in this county. The prosecuting attorney was contacted according to my information and proceeded.

MR. JACKSON: The crime occurred in several states, your Honor. It may have occurred in Texas, it may have occurred in Ohio. The only connection with Arkansas is that the money was seized in Crittenden County while it was in interstate commerce at a weigh station operated by the Highway Police, which has the blessings of Congress to avoid any commerce

clause problems. It was seized pursuant to a warrantless search. Before the prosecutor was even notified, — (R. 240.)

MR. HALE, III: Objection, your Honor. They can put witnesses on —.

MR. JACKSON: — the Highway Police —

MR. HALE, III: — to get into this.

COURT: Let him make his statement.

MR. JACKSON: — the Highway Police requested that the forfeiture — or that the seizure be adopted. At this point, there was no forfeiture or even forfeiture proceedings. The Highway Police requested on the Saturday after the money was seized between the hours of 8:00 and 9:30 or 10:00 o'clock or so — before the prosecutor's office was ever contacted — contacted the DEA, and the DEA adopted the forfeiture.

MR. HALE, JR.: There's nobody here —

MR. JACKSON: Once they adopted the forfeiture, the deputy prosecutor had no jurisdiction —

MR. HALE, III: Your Honor, he's talking about the relation-back doctrine. It's not applicable in this case.

MR. JACKSON: It is exactly applicable.

MR. HALE, III: It is not applicable, your Honor. These are issues why I wanted a chance to brief them. R. 241.

MR. JACKSON: If there are issues why the Feds should be made a party to these proceedings and are a necessary party, but they haven't been made a party to these proceedings —

COURT: It seems to me the only reason we're here is because somebody has decided they needed to circumvent Arkansas law in order to get a bigger share of the money. That's the —

MR. JACKSON: That is not the only reason.

MR. HALE, III: Let's put him on the stand because that's what he told us yesterday.

COURT: All right, y'all quit between yourselves. Go on and make a full statement. Let me hear what your ideas are.

. . . .

MR. WHARTON: . . . .

As the seizing agency, the Arkansas Highway Police merely asserted its right to notify the Drug Enforcement Agency of the United States Government and requested its assistance. R. 242. It had the right to do that. It did that. That it may not have do so in the past, is of no moment. That it may not have done so on many occasions in the past, is of no moment. That Mr. Hale's office may have handled the lion's share of forfeiture matters in this county in the past, is of no moment. We're talking about this one situation right now.

. . . . This Court never had jurisdiction over the money, over the *res* in this matter. As a result the Court cannot have in rem jurisdiction and also cannot ever have had in rem jurisdiction. R. 243.

This case — and I think everyone will agree — when I say that this matter is an in rem proceeding as opposed to an in personam proceeding. We're talking about money. The money is the defendant here. No person present here — and I think

the two deputy prosecutors will agree with me — no person present here will dispute this issue. It's not an issue. This is an in rem proceeding.

. . . . There are three cases here that bear the Court's attention. R. 243.

The first one, your Honor, is the *Madewell v. Downs* case. It's a relatively new Eighth Circuit case, and it becomes particularly important in view of the fact that on March 24th Mr. Hale, cited the *Madewell v. Downs* case in a letter to the United States Attorney, Paula Casey, to bolster his position for a return of the money.

But the case is dead against him. R. 244. I read to the Court in paragraph 24, I believe it is, "Courts have long held that a federal agency's adoption of a seizure has the same effect as if the federal agency had originally seized the property on the date it was seized by the local authorities."

Your Honor, the Eighth Circuit goes back to an 1819 United States Supreme Court case — the Caledonian — it's an admiralty matter. Much admiralty law is applicable in these forfeiture matters. It cited cases starting in 1819 going all the way up to 1989 to show the principle that a federal agency's adoption of a seizure has the same effect as if that agency had been there when the seizure first occurred. R. 244.

He also cites another case, *Republic National Bank of Miami v. U.S.* In that case Chief Justice Rehnquist quoted another old case out of the United States Supreme Court. It's an 1815 case — and I'm quoting a quotation by Judge Rehnquist — "A good subsisting seizure at the time when the libel or information is filed and allowed, if a seizure be completely and explicitly abandoned and the property restored by the voluntary act of the party who has made the seizure, all rights under it are

gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings, and it can be revived only by a new seizure. It is in this respect like a case of capture, which although well made gives no authority to the prior court to proceed to adjudication if it be voluntarily abandoned before judicial proceedings are instituted." R. 244-245.

Now, if we assume that the Court never had jurisdiction, *Madewell v. Downs* affirms that this Court never had jurisdiction. If we assume arguendo — and it is only assumption, your Honor, that this Court ever had jurisdiction over this three million dollars plus — then this Republic Bank of Miami when the prosecutor's office allowed the money to be taken to the Highway Department in Little Rock with their knowledge that it would be given to the DEA because the DEA's cooperation had been requested and given, they voluntarily allowed the money to go to the Highway Department and then the DEA. R. 245.

Now, a couple more cases. The Alston case and the Winston-Salem case. I don't know if you've got those, but let me just tell you very quickly. I'll give you a quotation out of the District Court. . . . And let me quote again from page 380 in this case.

Quote, "The DEA adopted the police department's seizure of the cash. The board does not dispute that the government has the power to adopt local seizures generally or that the government had probable cause to adopt the cash in this case. Notwithstanding these facts, the board claims that because the state court assumed jurisdiction over the cash prior to the institution of this action, the state court may exercise its jurisdiction to the exclusion of other courts. This assertion is without merit. By reason of the adoption principle, the cash is deemed to have been seized by the government and thus subject

to federal jurisdiction as of 4 February, 1987, the date of seizure."

Your honor, we're talkin' there about an adoption that occurred long after the seizure of the property. In the case before the Court now, we're talking about a seizure that occurred within a matter of just a few moments after the seizure took place before the prosecutor's office was brought in.

Now, the Fourth Circuit affirmed that decision about a year later and said, and I quote, "The district court concluded that the state court was without jurisdiction to issue orders concerning disposition of the case because the federal government had won the unseemly race to the res. The district court reasoned that when the DEA adopted the seizure, the cash was deemed to have been seized by the federal government on the date of the seizure by the police department." That's a local police department under concern here. The district court then noted that under a federal statue, 28 U.S.C. 1355, federal courts have exclusive original jurisdiction over forfeitures under federal law. R. 246-247.

And finally, your Honor, a case that the Madewell court followed three years later, is U.S. v. $12,390. . . .

Judge, this case is a four corners, dead on case with the one you've got to decide today, and it was followed by the Madewell court. . . ."The fact that the government had taken possession of the money and initiated the requisite paperwork for administrative forfeiture is determinative in this case." R. 247.

. . . .

. . . . On the 7th of March, the seizure occurred. Phone calls took place. R. 248.

On the 8th day, which was Sunday, 8th of March, the money was counted and a shake test was given. The next day the shake paper and the money was transported to Little Rock.

On the 10th of March a chemist with the Arkansas Crime Lab filed his report that there was a positive reaction for cocaine on the shake paper. . . . R. 249.

. . . .

On the 20th, the driver of the truck, Mr. Zamarripa, was served with summons, complaint, and notice of pending forfeiture. And note should be made, your Honor, that the summons was issued by the clerk of this court on the 20th of March, fully some 13 days after the seizure took place. R. 250. Notice of pending forfeiture was filed also on the 20th of March, fully 13 days after the seizure was made, and finally the petition for forfeiture was filed on the 20th of March, fully 13 days after the seizure was made. R. 250.

Also of interest to the Court should be the fact that on the 20th of March, the prosecutor's office caused a warning order to be issued in this matter and the complaint filed thereon.

Your Honor, I mean not to denigrate this Court's authority or dignity in any way, but this Court if it has no jurisdiction, it can't act, and it is our contention that this Court has no jurisdiction over the funds involved in this seizure. This Court never had jurisdiction over the funds in this seizure. And that's just the bottom line in it, your Honor. The Court does not have jurisdiction. Since the Court does not now nor has it ever had jurisdiction, the order to return the money should be withdrawn, the case should be dismissed and this matter be allowed to proceed with the DEA as I discussed with Jimbo Hale on the 9th of March. R. 250.

. . . .

Your Honor, this money was delivered to the Arkansas Highway Pol — or allowed to be taken to Little Rock with the understanding that a federal forfeiture proceeding would be initiated. We don't have the money. We did not have the money at the time that you ordered us to disgorge the money back to the bank account here in Marion, Arkansas. We did not have the money at that time with the knowledge by Jimbo Hale that we were not gonna have the money at that time. The money had already been transferred to the Drug Enforcement Administration and as I understand it now is in the hands of the United States Marshal. R. 251.

Your Honor, this case needs to be dismissed. Thank you, sir.

MR. HALE, III: Mr. Wharton has come to a lot of conclusions in his opening statement, but the fact remains can he back those up with law and fact.

He claims they are the seizing agency. I would suggest to the Court that they are not the seizing agency under state law, federal law, or anybody else's law. R. 251-252. They don't have authority to seize anything pursuant to our statutes. It's specifically set out that the prosecuting attorney is the one that does the seizures.

. . . .

. . . . This is an in rem proceeding. That's true. The notice was filed. We opened a case on March 9th — R. 252-253.

COURT: Has a federal case been filed?

MR. WHARTON: A federal administrative forfeiture proceeding that has been initiated, your Honor. R. 253.

COURT: Tell me just exactly what that is. Is it filed in District Court?

MR. WHARTON: It's an extrajudicial proceeding. It becomes a judicial proceeding, as I understand the federal process, if a claimant steps forward for the money. It then becomes a judicial proceeding.

MR. HALE, III: So there's no judicial proceeding filed in Federal Court at all. Is that correct?

MR. WHARTON: There is no judicial proceeding but — it's a statutory proceeding is what it is, your Honor.

COURT: I understand.

MR. HALE, III: And that was in my understanding not even commenced until the 16th. Is that true?

MR. WHARTON: No sir. That's not true.

MR. HALE, III: That's when the administrative proceeding was filed —

MR. WHARTON: The administrative proceeding began on the night of the seizure, your Honor. R. 253-254.

MR. HALE, III: Your Honor, that is pursuant to the relation-back doctrine they're speaking of, and I would suggest it is not applicable in this case, and I would like the opportunity to brief it at a later time.

The three cases they cited — I'm familiar with some of them. The *Madewell v. Downs* case — as I said, I would like an opportunity to set this out in a brief.

COURT: I'll give you an opportunity to brief it.

MR. HALE, III: In the *Madewell v. Downs* the court did say this: "Although this Court would not suggest a late federal adoption of a seizure, an actual transfer of the property to federal control could or should be used to avoid the effects of proper state court proceedings concerning the seized property after its seizure by the state or local officials and before federal adoption."

Your Honor, that is exactly what we have here today. Mr. Jackson told us yesterday that they want to take this federal to get a bigger piece of the pie, and that's what he said on the phone.

MR. JACKSON: I object, your Honor. That is a mischaracterization of what was said.

. . . .

MR. JACKSON: That was one of the reasons — in an effort to be candid with the court — but there are also many others including the size of the money, and there is a federal investigation involving federal crimes over interstate — over several states. The Feds are more capable of investigating. R. 255.

MR. HALE, III: As I said, the case stands for that also. . . . The other cases that they have cited — I believe it's the $12,290 case. This is a case where there was no state forfeiture action filed at all — nothing. And that is what the court based its decision on.

That is also true with the other case they cited — maybe it was the Madewell case. That case stemmed on the fact that it was a criminal proceeding, and there was a motion to return the property filed through the criminal court. In that case there was no state proceeding filed at all. And that's what the court based its decisions on. R. 255.

I would also cite *United States v. One Cadillac Seville* — it's a Ninth Circuit case. R. 256. I mean, the bottom line, your Honor, it just says that, "Under the rule against concurrent in rem proceedings, there must be some affirmative act of abandonment by the state court in order for the federal courts to exercise jurisdiction."

That was not the case here. The money was in the bank vault. We had secured the money. The prosecutor's office did as you will see from the banker's testimony. It was us that secured the money. It was us that got it counted. It was us that had the money there. They came and got it, and they were supposed to take it to the Crime Lab. That's what they were supposed to do with it, not take it to the DEA. There was never an agreement between our office — the prosecuting attorney's office — and the DEA or anybody else that this was going federal.

COURT: Has your office had any contact with a federal agency?

MR. HALE, III: The only time we ever had any contact with them at all was on March 20th when I got a call from some marshal that said he's not going to obey the order. That's the first time our office was put on notice that anything had started, and that's when I got on the phone and called the [Assistant U.S.] Attorney, Gwendolyn Hodge, I believe, to ask her what was going on. R. 257.

COURT: Okay. I think I've got the picture if y'all want to start calling witnesses.

MR. HALE, III: One other thing I do want to bring up and the Court should consider before it hears anything is that the Arkansas Highway Police is a law enforcement agency of the State of Arkansas. These gentlemen, Messrs. Wharton and Jackson, are employees of the State and represent the State.

. . . .

COURT: Isn't there a state statute that the money would be deposited all but $250,000 into some kind of state drug —. R. 258.

MR. HALE, III: Yes, you Honor. That's our state and they are doing this to circumvent how the legislature has seen fit to disburse the money and they are willing to do that at the cost of $600,000. . . .

COURT: I want the record to reflect that the Court had my case coordinator send a notice of hearing to Paula Casey, U.S. Attorney; Gwendolyn Hodge, Assistant U.S. Attorney; Mr. Chip Massanelli, U.S. Marshal; and Bill Bryant, Director of the DEA. And none of those people have appeared. I guess they don't have any interest in it, would be my thought about it. R. 258-259.

I'm ready to listen to your witnesses but before we do that, but Mr. Wharton made a statement that the Highway Police was exercising its rights to notify the DEA and to refer the forfeiture to the DEA.

I'm really puzzled by this. I think, a law enforcement agency in the State of Arkansas has to address itself to the local prosecuting attorney. You have no charging authority at all. The prosecutor is exclusive or a grand jury. So what rights have you exercised? I don't understand why there is an

adversarial relationship between an agency of the state and its duly authorized prosecuting attorney.

MR. WHARTON: Your Honor, very often — and this Court's well aware of that — you were a prosecuting attorney for many years. Very often local agencies are used by federal agencies, and federal agencies are called on by local agencies to assist. This is not unusual, your Honor. R. 259.

COURT: I know that's not unusual, but it's usually at the request of the prosecuting attorney. In fact I thought there was a hard and fast rule — I want to say the Petite Policy — or some federal case where the federal government won't even take jurisdiction of a case unless the state requests its assistance once its been filed. R. 259-260.

MR. WHARTON: I'm not familiar with that particular principle, your Honor.

COURT: There's a policy on that. I might have misstated the name. I recognize this is a large amount of money and draws a lot of interest, although apparently it hasn't drawn anybody that wants to claim the money except some guy that decided not to later. R. 260.

I understand also we have some kind of legislation passed that would create a huge fund in Little Rock on the excess dollars — over $250,000 — and that's probably the real reason we're here, and that's unfortunate. I don't think any forfeiture has ever gone into that account. But that's probably why we're here. I would prefer the State of Arkansas receiving all the benefit of any seized money if it comes to that, but I'll go ahead and hear what the witnesses have to say.

I guess what we need to stress is how the money left here and under what circumstances and where it ended up, and

that will determine whether or not I follow these cases — whether or not this Court has jurisdiction. It's hard for me to conceive how I don't have jurisdiction, frankly, but I'll have to read the cases in detail. Let's call the witnesses and find out just exactly how the money left here. R. 260-261.

. . . .

[During Testimony of Capt. Danny McLean]

MR. WHARTON: Did Jimbo Hale, Jr. seize the money out of the cab of Mr. Zamarripa's truck? R. 291.

MR. HALE, III: Objection. That's a conclusionary —

COURT: There isn't any question in the Court's mind that the money was seized by the Highway Police officer.

MR. WHARTON: Your Honor, this individual signed a pleading very recently that says that the prosecuting attorney's office was the seizing agency. I want the record clear that they are not the seizing agency.

MR. HALE, III: Your Honor, there's a big difference in taking possession of something and seizing it. That is the key issue here. Before you jump to a conclusion here, I think you need to hear all the evidence.

COURT: I'm not jumping to any conclusion. From a physical standpoint of who actually seized the money from the truck, it was Officer Smith. Now, who developed the right to possess that money and to file a claim for the disposition of it is really the issue before the Court. I'm not paying a whole lot of attention to that. R. 292.

. . . .

MR. WHARTON: Your honor, nobody disputes that the prosecuting attorney was involved in this. Nobody dis — they went out to the weigh station. There's no disputation there. We do not deny that these two men were there that night. All of the witnesses that have testified have been our witnesses, and they testified that they were there with the exception of Mr. Hale.

COURT: I know they were there. They called me to fix the bond. R. 310.

MR. WHARTON: I don't understand what the issue is about these guys not being there.

MR. HALE, III: The issue, your honor, is you have a question of possessing or seizing. If you just have to grab something and that's a seizure — and the reason it's so important is it triggers the statutory language. The seizing agency has authority to say where the money goes. R. 310. So it is very important because it's a difference in me just taking possession of something and sitting there and holding it. But when you seize it, you have to do other things to make sure the procedure is followed through. That is the only reason I'm going into this is because that is a key issue in this case is possession — who was the seizing agency.

COURT: I think you pretty well covered it with him.

. . . .

[During Testimony of Capt. George Coffman]

MR. HALE, III: I guess it's your position that — the DEA scrapes off 20 percent for handling the forfeiture. Isn't that correct?

WITNESS: No, sir.

MR. WHARTON: Your honor, that's an unfair characterization of the federal law. R. 326.

. . . .

MR. WHARTON: Your Honor, that's a federal law. If he's disparaging the federal government, fine, but that's exactly what he's doing. R. 327.

COURT: I think his question is factual. I don't know whether Capt. Coffman can answer it. It's obvious to the Court — and you gentlemen have been rather candid about it — that this is an effort to avoid the cap, which I don't blame you. I can understand that. I'm also not aware of any money ever being deposited into that fund. Somehow, everybody has been able to avoid it. Has anybody ever checked to see if any money has ever been deposited in that account?

. . . .

COURT: Anything else?

MR. WHARTON: Nothing from the Highway Police.

MR. HALE, III: Your Honor, you've heard it all — most of it or whatever we could have here today anyway. Your Honor, I do want to say that all these issues — I would like the opportunity to brief them. We have a couple of key issues that are probably going to require some looking at.

I would like to renew my motion to dismiss the movant's motion on the basis they don't have any authority to be here and challenge us. If they do, they should have filed a motion to intervene and stated why. All they do is say, hey, we're here.

We're a party in interest. In a motion to intervene they have to say why. R. 392.

MR. JACKSON: Your Honor, we would gladly not be here, but the fact is there's a standing order that directs the Highway Police to take an action that it cannot take. I think I communicated that if we had received the order before the transfer occurred, we might not have liked it, but we certainly would have complied with a standing order of the court regardless of our preferences. We have utmost respect for the bench, but this is something that is completely out of our hands.

COURT: Well, it's apparent to the Court that you certainly don't have possession of the 3 million one at this time, that somebody that is not here and didn't dignify the Court with appearing has it. What they plan to do with it, I don't know.

There are several issues I'd like to be supplied some law on. One is what authority, if any, does the Director of the Arkansas Highway Police have to direct cases to the federal government, he being an official of the state, and the prosecuting attorney's office, wherever it might be, has that power and that authority exclusively. The charging decision has always been the prosecuting attorney's. It's not a — but your argument on the money not being here — really, I'm not sure the Highway Police has any position at all at this point.

MR. JACKSON: That's what we thought. R. 393.

COURT: I also note from the docket that the notice of seizure for forfeiture was filed in the A.M. in this court at which time the prosecuting attorney had possession of the money. That seems to me to be notice to the federal government or others that the state intends to pursue action. And it's further supplemented by additional filings on the 11th, the 12th, the 13th for search warrant, for quite a number of things, which is

totally and completely inconsistent with the idea that the local prosecuting attorney waived their right to pursue the moneys.

I'm not so much concerned about the order that I entered directing the Highway Police to deliver the money because as your brief points out, you're not capable of doing that right now. But I am curious as to just exactly what you position is.

You're an agency of the state government and the prosecuting attorney is the vehicle for pursuing actions on behalf of state government. Clearly the money was seized here. It doesn't really matter whether it had been in all fifty states. It was actually seized here and obtained here and possession taken. R. 394. I guess the issue is what does it take to be a seizure and what is the difference between a seizure and just mere possession. I would like to have those two issues briefed.

As far as vacating the order requiring the Highway Police to surrender the money, are you telling me as officers of the Court that you no longer have any control whatsoever over the disposition of that money — any say in it at all?

MR. JACKSON: That's my understanding.

MR. WHARTON: That's correct.

COURT: Are you telling me that you haven't entered into any kind of written deal with the federal government as to a share that you might take in the event of a successful forfeiture?

MR. JACKSON: In the interest of candor, we do intend to submit what I think was referred to as a DAG-71. If those are not submitted within the next few days, then we'll lose out on an opportunity to participate in the federal forfeiture.

See, it's not so much what the state did. If it were our actions, they could be undone. But the problem is the federal government adopted the seizure. It was a federal action. R. 395.

COURT: But I don't think they could adopt it until after the state had given notice. If they did, I think that the state notice would be sufficient.

MR. JACKSON: Our understanding is that it was adopted on that Saturday when it was seized, and I believe that was the testimony of Mr. Davis.

MR. WHARTON: Clearly that was the testimony of Officer Davis. R. 395.

COURT: I understood Officer Davis, who is an officer of the Arkansas Highway Police.

MR. WHARTON: And a DEA agent, your Honor.

COURT: I'm also concerned about the fact that whether we like it or not, it's merely a ploy to circumvent the statute that would only allow $250,000 to be given to the seizing agency. As far as requiring you to comply with my order, I'll let you off the hook on that but before I enter a final order on this, I want y'all to rebrief the issue. How much time do you want?

MR. HALE, III: Your Honor, could I get back with the Court? I need to check my trial docket because I don't want to —.

COURT: Ten or fifteen days? Is that all right. R. 396.

MR. JACKSON: We would like the opportunity to have the opportunity of five additional days to reply. We would also like the opportunity to continue to speak with the prosecutor's office.

COURT: Well, sure. If y'all can work something out, that will be all right.

MR. HALE, III: May we have permission to talk to the officers so we can —

COURT: I don't know of any reason why you can't talk to the officers. You're the proper investigative agency for this county, and they are agents for the state. And there is no adversarial position between the state. Y'all might not agree, but it's not in that sense an adversarial position. And certainly you can interview the officers. It would be the Court's ruling on that.

I'd like to see Ms. Casey and these others brought in here. I don't see any reason why they can't answer a subpoena — why they can't be brought in as necessary parties, and I think they should be.

MR. JACKSON: I think so, too, but we're not in a position to bring them in.

COURT: I think Mr. Hale sure can do it. R. 396.

MR. HALE, III: They don't have anything to do with it. They don't have jurisdiction. R. 397.

COURT: Well, they have the money. If I said today it's a state action, you're still going to have to bring them into it. I don't think they can avoid a state action in it. They might ask

leave to remove it to federal court and have a federal judge decide, but they're not immune to process by the state.

MR. JACKSON: I don't mean to argue that but they have peculiar ways of receiving process.

COURT: Well, you can always serve the attorney general.

(END OF HEARING)

B. WHERE ISSUES RULED ON

[See, the orders dated April 20 & 24, 1998, the excerpts from April 1, 1998 Hearing, the order dated May 8, 1998, the Arkansas Supreme Court Opinion dated March 18, 1999, and the Arkansas Supreme Court's denial of rehearing on April 29, 1999, all of which are set for *supra.* In addition, the issues in Petitioner's Motion to Reconsider in the trial court were deemed to have been denied on June 16, 1998, pursuant to Ark. R. App. Pro. Civil Rule 4(c) of the Arkansas Rules of Appellate Procedure - Civil, which is now Rule 4(b).]

VI. OTHER MATERIAL THE PETITIONER BELIEVES ESSENTIAL TO UNDERSTAND THE PETITION

CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Notice of Seizure for Forfeiture (R. 1-2)
(Filed March 9, 1998)

TO: Roberto V. Zamarripa, 1201 W Hays, Harlingen, Texas 78550

CIV 98-226

YOU ARE HEREBY GIVEN NOTICE pursuant to Arkansas Code Annotated Section 5-64-505 et seq. that the following property has been seized for forfeiture at the following location on the following date:

Property:	$3,166,199.00 U.S. CURRENCY
I.D. serial No.:	N/A
Date:	3/7/98
Location:	INTERSTATE 40 WESTBOUND

SCALES

Appraised Value: N/A

Cause of Seizure: Violation of A.C.A. 5-64-505

As an owner, interest-holder, or other party claiming such status, you must within **thirty (30)** days from the first date of receipt of this letter, file with the Prosecuting Attorney at the address listed below a **NOTICE FOR JUDICIAL REFERRAL OF FORFEITURE** in order to terminate this uncontested forfeiture proceeding and cause referral of the case for judicial forfeiture.

Failure to file a **NOTICE FOR JUDICIAL REFERRAL OF FORFEITURE** within the above referenced time period will result in the forfeiture of the property, without contest.

A NOTICE OF JUDICIAL REFERRAL OF FORFEITURE must contain:

A statement describing the property and showing your ownership or interest in the property;

Supporting documents to establish your ownership or interest; and

A certification under oath, and subject to penalty of perjury, signed by you as owner or interest holder stating that you have read the document and that such notice is not filed for any improper reason, such as delay or harassment. R. 2.

A NOTICE OF JUDICIAL REFERRAL OF FORFEITURE must be filed within **thirty (30)** days at the following address:

James C. Hale, Jr., Deputy Prosecuting Attorney, P.O. Box 239, Marion, AR 72364.

Brent Davis, Prosecuting Attorney, Plaintiff
By: /S/ James C. Hale, Jr., Deputy Prosecuting Attorney

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas	Plaintiff
v.	
$3,166,199 U.S. Currency	Defendant
Roberto V. Zamarripa Omar Saenz	Claimants

Notice of Seizure for Forfeiture (R. 4-5)
(Filed March 11, 1998)

TO: Omar Saenz

CIV 98-226

YOU ARE HEREBY GIVEN NOTICE pursuant to Arkansas Code Annotated Section 5-64-505 et seq. that the following property has been seized for forfeiture at the following location on the following date:

Property:	$3,166,199.00 U.S. CURRENCY
I.D. serial No.:	N/A
Date:	3/7/98
Location:	INTERSTATE 40 WESTBOUND SCALES

Appraised Value: N/A

Cause of Seizure: Violation of A.C.A. 5-64-505

As An owner, interest-holder, or other party claiming such status, you must within **thirty (30)** days from the first date of receipt of this letter, file with the Prosecuting Attorney at the address listed below a **NOTICE FOR JUDICIAL REFERRAL OF FORFEITURE** in order to terminate this uncontested forfeiture proceeding and cause referral of the case for judicial forfeiture.

Failure to file a **NOTICE FOR JUDICIAL REFERRAL OF FORFEITURE** within the above referenced time period will result in the forfeiture of the property, without contest.

A NOTICE OF JUDICIAL REFERRAL OF FORFEITURE must contain:

A statement describing the property and showing your ownership or interest in the property;

Supporting documents to establish your ownership or interest; and

A certification under oath, and subject to penalty of perjury, signed by you as owner or interest holder stating that you have read the document and that such notice is not filed for any improper reason, such as delay or harassment. R. 5.

A NOTICE OF JUDICIAL REFERRAL OF FORFEITURE must be filed within **thirty (30)** days at the following address:

James C. Hale, Jr., Deputy Prosecuting Attorney, P.O. Box 239, Marion, AR 72364.

Brent Davis, Prosecuting Attorney, Plaintiff
By: /S/ James C. Hale, Jr., Deputy Prosecuting Attorney

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Warning Order
(Issued/Filed March 20, 1998) R. 26.

The defendant, $3,166,199.00 U.S. Currency or any person claiming any claiming any right, title, or interest in the $3,166,199.00 U.S. Currency, is hereby warned to appear in this Court within thirty (30) days from the first date of publication of this Warning Order or be barred from answering or asserting his interest in the $3,166,199.00 U.S. Currency.

WITNESS my hand and seal as Clerk of Circuit Court of Crittenden County, Arkansas this 20th day of March, 1998.

Donna Palmer, Crittenden County Circuit Clerk
By: /S/ Terry Hawkins DC

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Complaint
(Filed March 20, 1998) R. 34-36.

Comes now the Plaintiff, by and through its attorney, James C. Hale, III, attorney for the State of Arkansas, and states:

1. This is a civil action for forfeiture of property pursuant to A.C.A. § 5-64-505. R. 34.

2. This court has jurisdiction over this matter pursuant to A.C.A. § 5-64-505(m). R. 34.

3. That the Circuit Court of Crittenden County, Arkansas has jurisdiction because the property was seized in Crittenden County, Arkansas. R. 34.

4. That venue is proper in Crittenden County based on the allegations set forth in paragraph 3. R. 34.

5. The subject matter of this action is Three Million One Hundred Sixty Six One Hundred Ninety Nine *[sic]* ($3,166,199.00) dollars in U.S. Currency. R. 34.

6. The property is deposited in a Federally Insured Depository within the State of Arkansas and will be located within the State of Arkansas during the pendency of this action. R. 34.

7. The Plaintiff has authority to maintain this action through the office of the Prosecuting Attorney of the Second Judicial District for the State of Arkansas pursuant to A.C.A. § 5-64-501. R. 34.

8. That on or about March 7, 1998, the claimant, Roberto V. Zamarripa was stopped by an officer of the Arkansas Highway Police for a MCSAP inspection on Interstate 40 in Crittenden County, Arkansas. R. 34.

9. That the Claimant, Roberto V. Zamarripa, signed a written consent to search of the vehicle. (See Exhibit "A" attached hereto.) R. 35.

10. That Upon a search of the vehicle, Three Million One Hundred Sixty Six One Hundred Ninety Nine *[sic]* ($3,166,199.00) dollars in U.S. Currency was found in suitcases in the vehicle.

11. That upon inspection of the suitcases and U.S. Currency, a white powder believed to be cocaine was detected. R. 35.

12. That the white powder substance was sealed and forwarded to the Arkansas State Crime Laboratory located in Little Rock, Arkansas whereas the above-mentioned item tested positive for cocaine. R. 35.

13. That the Three Million One Hundred Sixty Six One Hundred Ninety Nine *[sic]* ($3,166,199.00) dollars in U.S.

Currency was found in close proximity to a controlled substance and is forfeitable pursuant to A.C.A. § 5-64-505. R. 35.

14. That upon information and belief, the Three Million One Hundred Sixty Six One Hundred Ninety Nine *[sic]* ($3,166,199.00) dollars in U.S. Currency is proceeds and profits stemming from the exchange of and/or sale of a controlled substance and forfeitable pursuant to A.C.A. § 5-64-505. R. 35.

WHEREFORE, Plaintiff prays that the Court adjudge the Three Million One Hundred Sixty Six One Hundred Ninety Nine *[sic]* ($3,166,199.00) dollars in U.S. Currency condemned and forfeited, that the Court order said property disposed of as provided by law, for attorney's fees, costs, and for such further relief as the Court may deem proper. R. 35.

/S/ James C. Hale, III
Attorney for State of Arkansas

[No certificate of service]

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Notice of Pending Forfeiture
(Filed March 20, 1998) R. 39.

TO: All persons claiming any right, title, or interest in property described as follows:

$3,166,199.00 U.S. Currency

NOTICE IS HEREBY GIVEN that on March 7, 1998, the above described property was seized in Crittenden County, Arkansas, by the Arkansas Highway Police for violation of A.C.A. 5-64-505. R. 39. The circumstances of the seizure are more particularly described as follows:

A. The above-mentioned U.S. Currency was found in close proximity to a controlled substance (cocaine).

B. The above-mentioned U.S. Currency is proceeds and/or profits stemming from the exchange of and/or sale of a controlled substance (cocaine). R. 39.

On the 11th day of March, 1998, civil proceedings were commenced in the Crittenden County Circuit Court by the State of Arkansas, Plaintiff, for the condemnation and forfeiture of the described property pursuant to A.C.A. § 5-64-505.

You have thirty (30) days from the date of this Notice to file with the Clerk of the above-mentioned Court an answer for the above-described property. R. 39.
DATED this 20th day of March, 1998.

State of Arkansas Plaintiff
By: /S/ James C. Hale, III

CIRCUIT COURT OF
CRITTENDEN COUNTY, ARKANSAS

State of Arkansas — Plaintiff

v.

$3,166,199 U.S. Currency — Defendant

Roberto V. Zamarripa
Omar Saenz — Claimants

Summons
(Issued March 20, 1998. Returned March 20, 1998) R. 43.

ATTORNEY FOR PLAINTIFF: James C. Hale, III . . . .
THE STATE OF ARKANSAS TO: Claimant Roberto V. Zamarripa, 1201 W. Hays, Harlingen, Texas 78550

Notice

1. You are hereby notified that a lawsuit has been filed against you; the relief is stated in the attached complaint.

2. The attached Complaint will be considered admitted by you and a judgment by default may be entered against you for the relief asked in the Complaint unless you file a pleading and thereafter appear and present your defense. Your pleading or answer must meet the following requirements:

A. It must be in writing, and otherwise comply with the Arkansas Rules of Civil Procedure.

B. It must be filed with the Clerk's office within thirty (30) days from the day you were served with this summons.

3. If you desire to be represented by an attorney you should immediately contact your attorney so that an answer can be filed for you within the time allowed.

Additional Notices:

WITNESS my hand and seal of this Court this 20th day of March, 1998.

/S/ Donna Palmer, Circuit Clerk